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In The

Supreme Court of the United States

October Term, 1997

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC. and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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QUESTIONS PRESENTED

I. Did the Oklahoma Supreme Court err in holding that Petitioners' participation in unincorporated workers compensation group self insurance associations were not subject to the Federal Securities Act of 1933 because the McCarran-Ferguson Act preempted such coverage?

II. Did the Oklahoma Supreme Court's ruling that the protection of the Oklahoma Securities Act was not available to the Petitioners effect an impermissible retroactive application of 85 O.S. 1996 § 149.1.C., in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

This is a Joint Petition for Writ of Certiorari under Rule 12.4, wherein two judgments are sought to be reviewed on a writ of certiorari to the same Court and involve identical or closely related questions. The Petitioners in this case are: The YWCA of Oklahoma City, Century Martial Arts Supply, Inc., E & H Transfer, Inc., City Glass Co., Flip's Wine Bar & Trattoria, Inc., Mangum Brick Company, Ronnie's Signs, Inc., Dalmarc Enterprises Incorporated, Barbara J. Wilson, Oklahoma Steel & Wire, Inc., C & H Power Line Construction, Inc., Chris Hunt Water Hauling, Inc., John Vance Motors, Inc., Troy Westnidge, Inc. and Colbert Nursing Home, Inc. The Respondents in this case are Self Insurers' Management Group and Oklahoma Employers' Safety Group, S.I.A. All parties before the Oklahoma Supreme Court are before this Court.

RULE 29.6 STATEMENT

As required by Rule 29.6 of this Court, none of the corporate joint petitioners have parent companies or non-wholly owned subsidiaries, except as follows:

A. Century Martial Arts Supply, Inc.'s parent is Century Incorporated.

B. Mangum Brick Company's parent is Jewett Scott Truck Lines, Inc.

C. Oklahoma Steel & Wire, Co., Inc. has one subsidiary, Cyclone Truck, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

RULE 29.6 STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES ... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING CERTIORARI 7

PROPOSITION I: THE MCCARRAN-FERGUSON ACT SHOULD NOT APPLY TO NULLIFY FEDERAL SECURITIES LAWS 8

PROPOSITION II: THE OKLAHOMA SUPREME COURT'S RETROACTIVE APPLICATION OF A LEGISLATIVE AMENDMENT RENDERING STATE SECURITIES LAWS INAPPLICABLE TO A GROUP SELF-INSURER ASSOCIATION DIVESTED PETITIONERS OF A VESTED RIGHT TO A DEFENSE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 14

CONCLUSION 18

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 at 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) 17

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 116 S.Ct. 1108, 134 L.Ed.2d 237 (1996) 11

Federal Trade Commission v. Dixie Finance Company, Inc., 695 F.2d 926 (5th Cir. 1983), cert. denied, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983) 13

General Motors Corp. v. Romein, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) 17

Group Life and Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979) 13

Hartford Fire Insurance Co. v. California, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)..... 12

Home Building Loan and Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934) 17

Holloway v. Peat, Marwick, Mitchell & Co., 879 F.2d 772 (10th Cir. 1989 Okl.), cert. granted and vacated, *Peat Marwick Main & Co. v. Holloway*, 494 U.S. 1014, on remand, 900 F.2d 1485 (10th Cir. 1990), cert. denied, *KPMG Peat Marwick v. Holloway*, 498 U.S. 958 (1990) 9

Howlett By and Through Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990)..... 9

Landgraf v. USI Film Products., 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) 16

TABLE OF AUTHORITIES – Continued

Page

Lennox v. Evans, 87 F.3d 431 (10th Cir. 1996 Okl.) 16

Liner v. DiCresce, 905 F.Supp. 280 (M.D.N.C. 1994) 11

McDonald v. Champion, 962 F.2d 1455 (10th Cir. 1992, Okl.), cert. denied, 506 U.S. 890 (1992) 16

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985)..... 11

Oklahoma Employers' Safety Group S.I.A., v. Colbert Nursing Home, Inc., 1997 OK 94, 954 P.2d 120 1

Pilot Life Insurance Co. v. Bedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)..... 12

Securities and Exchange Commission v. Life Partners, Inc., 87 F.3d 536 (D.C. Cir. 1996)..... 13

Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969)..... 10, 11, 14

Self Insurers' Management Group v. YWCA of Oklahoma City, et al., 1997 OK 95, 954 P.2d 115..... 1

Sellers v. Allstate Insurance Co., 82 F.3d 350 (10th Cir. 1996) 17

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982)..... 12

United States Trust Company of New York v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) 17

U.S. Department of Treasury v. Fabe, 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993) 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Federal:

Securities Act of 1933 (15 U.S.C. § 77a. et seq.) 5, 7, 8, 14

15 U.S.C. § 77b 8

15 U.S.C. § 77e 2

15 U.S.C. § 77j 2

15 U.S.C. § 77l 2

McCarran-Ferguson Act (15 U.S.C. § 1012) 7

15 U.S.C. § 1012(b) 2, 10

28 U.S.C. § 1257(a) 2

Oklahoma Statutes:

Oklahoma Securities Act (Title 71, Oklahoma Statutes § 1 et seq.) 15

71 O.S. § 301 2

71 O.S. § 408(a)(1) 2

71 O.S. § 408(2)(A) 2

71 O.S. § 408(i) 2

85 O.S. 1991 § 149.1 ..... 6, 14, 15, 16

85 O.S. 1996 § 149.1 ..... 2, 3, 8, 13

85 O.S. 1996 § 149.1.C. 7, 18

TABLE OF AUTHORITIES – Continued

Page

Other States' Statutes:

Kentucky Human Labor and Human Rights Statute, § 342.342; Nevada and Industry Relations Statute 616B.386; Mississippi Workers' Compensation Statute, § 71-3-75; Georgia Group Insurance Funds Regulation, § 120-2-34-9-150; Maine Bureau of Insurance Rule, Chapter 250-III; Missouri Division of Workers' Compensation Rules 8 C.S.R. 50-3-010; Nebraska Workmen's Compensation Court Rules No. 48-145; Connecticut Workmen's Compensation Code, § 31-328; Arkansas Workers' Compensation Commission Rules and Regulations, Rule 5, part III; Michigan Department of Labor Bureau of Disability Compensation, Rule 408.43(d) et seq., § 418.205 ...3, 4

OTHER AUTHORITIES

Rule 29.6 of the United States Supreme Court Oklahoma Supreme Court Rule 1.36(g)..... 6

Larson's Workers' Compensation Law, § 92.11..... 3

Oklahoma Supreme Court Opinions to be reviewed were entered July 8, 1997.....1, 9

U.S. Const. amend. XIV, Section 1..... 2

Fourteenth Amendment to United States Constitution 7, 15

"Supremacy Clause", U.S. Const. art. VI, cl. 2..... 9

United States Constitution, Article I, Section 10, i.e., "Contract Clause"..... 17

Oklahoma Constitution, Article 5, Section 52..... 16

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

The YWCA of Oklahoma City ("YWCA"), Colbert Nursing Home, Inc. ("Colbert") and the other petitioners (collectively the "Petitioners") ask this Court for a writ of certiorari to review two companion decisions of the Oklahoma Supreme Court rendered July 8, 1997.

OPINIONS BELOW

The two companion opinions below of the Oklahoma Supreme Court are officially reported as *Self Insurers' Management Group v. YWCA of Oklahoma City, et al.*, 1997 OK 95, 954 P.2d 115, and *Oklahoma Employers' Safety Group S.I.A., v. Colbert Nursing Home, Inc.*, 1997 OK 94, 954 P.2d 120. These opinions have been reprinted in the Appendix at App. 1 and 15.

The Judgments of the District Court of Oklahoma County, State of Oklahoma, from which the Oklahoma Supreme Court appeal was taken, and the Order of the Supreme Court denying Petitioners' Petitions For Rehearing have not been reported. The District Court Judgments are reprinted in the Appendix at App. 25 and 31, and the Oklahoma Supreme Court Order denying both Petitions for Rehearing appear in the Appendix at App. 34.

JURISDICTION

The Oklahoma Supreme Court Opinions to be reviewed were entered July 8, 1997. (App. 1 and 15.) On

March 9, 1998 the Oklahoma Supreme Court denied the Petitioners' respective Petitions for Rehearing in one Order which appears at App. 34. Jurisdiction is provided under 28 U.S.C. § 1257(a), which confers on this Court jurisdiction to review on a writ of certiorari final judgments or decrees rendered by the highest court of a State in which a decision could be had, in this case the Oklahoma Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the following constitutional provisions and statutes which are fully reprinted in the Appendix: U.S. Const. amend. XIV, Section 1; 15 U.S.C. § 77e; 15 U.S.C. § 77l; 15 U.S.C. § 77j; 15 U.S.C. § 1012; 71 O.S. § 301; 71 O.S. § 408(a)(1) and (2)(A); 71 O.S. § 408(i); and 85 O.S. § 149.1.

STATEMENT OF THE CASE

This Joint Petition relates to purchase agreements constituting investments in workers' compensation group self-insurer associations. These associations (the "Respondents") are designed to provide participants, like the Petitioners, the opportunity to meet their state workers' compensation obligations to their own employees; and to also, through the pooling of their investment and liability with others (a) realize profit or (b) incur additional liability and loss. The issues involve the application of State and Federal Securities Laws to the agreements and the Oklahoma Supreme Court's retroactive application of a

new (as to Petitioner YWCA, post-District Court Judgment) statutory amendment removing these associations from the protection of state securities laws.

Factual Background

Both Self Insurer's Management Group ("SIMG") and Oklahoma Employers' Safety Group, S.I.A. ("OESG") are unincorporated group self-insurance associations. Such associations are a statutorily authorized alternative to fulfill workers' compensation insurance requirements for Oklahoma employers. 85 O.S. § 149.1. More than half the states permit formation of these group self-insurance associations. See *Larson's Workers' Compensation Law*, § 92.11.[1] One fundamental difference in these associations

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[1] The following states have adopted provisions allowing for "group" self insurance associations similar to Oklahoma, to wit:

1. Kentucky Human Labor and Human Rights Statute, § 342.342;
2. Nevada and Industry Relations Statute 616B.386;
3. Mississippi Workers' Compensation Statute, § 71-3-75;
4. Georgia Group Insurance Funds Regulation, § 120-2-34-9-150;
5. Maine Bureau of Insurance Rule, Chapter 250-III;
6. Missouri Division of Workers' Compensation Rules 8 C.S.R. 50-3-010;
7. Nebraska Workmen's Compensation Court Rules No. 48-145;
8. Connecticut Workmen's Compensation Code, § 31-328;

from the purchase of a straight, or regular workers' compensation policy is that ownership/shares of the association is vested in small businesses who are "members", and the association is managed by a board of directors and an elected "administrator". If properly managed, the association operates at a profit and pays dividends to the members. If the association operates at a loss, assessments or additional amounts may be billed to the members. A fundamental requirement of these associations is that each member must agree to be jointly and severally liable for the workers' compensation liabilities of every other member.

Management of the associations is composed of a Member Supervisory Board and officers *selected by the members* to hold and manage the assets; direct the affairs of the association; and assure that the association, through its members, is financially sound and able to meet its obligations under the Workers' Compensation Act.

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9. Arkansas Workers' Compensation Commission Rules and Regulations, Rule 5, part III;

10. Michigan Department of Labor Bureau of Disability Compensation, Rule 408.43(d) et seq., § 418.205.

In addition, the following states also have similar laws: California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin.

It is undisputed that in connection with the offer and sale of interests in the Associations, (1) the Respondents used the mail, telephone, and other means of interstate commerce; (2) none of the securities offered to or purchased by the Petitioners were registered under the Oklahoma Securities Act or the Securities Act of 1933; (3) the Respondents made hundreds of sales of interests; and (4) the Respondents did not disclose even minimal financial information necessary for the Petitioners to make an informed decision to participate.

History Of The Litigation

In the District Court below the Respondents filed suit in Oklahoma County District Court (the Honorable Niles Jackson presiding in both actions) and claimed the Petitioners owed additional funds (Respondent SIMG claimed the YWCA Petitioners were jointly and severally liable for $2.5 million dollars of deficits of that association; and Respondent OESG claimed additional amounts due of $58,060.00 from Colbert, after executing on a deposit). The Joint Petitioners responded by claiming the membership participation agreements were obtained in violation of the Oklahoma Securities Act and the Securities Act of 1933, among other defenses. See Oklahoma Supreme Court Opinions at App. 5 and 18.

The Petitioners were granted summary judgment in the District Court on the basis (among others) that the interests purchased were unregistered securities for purposes of both the Oklahoma Securities Act and the Securities Act of 1933. Pertinent quotations from the Petitioners' Briefs raising the issues in this Joint Petition, and other

issues, are set out in the Appendix at App. 46-55 and App. 56-72. An amendment to 85 O.S. 1991, § 149.1 became effective on November 1, 1996, adding subsection C, declaring that workers' compensation group self-insurers shall not be subject to the Oklahoma Securities Act. This amendment occurred *after* District Court judgment in favor of the YWCA Petitioners in the SIMG action, and *after* Colbert filed its Counterclaim, but before judgment in the OESG action. App. 10 and 13, and 20, respectively.

Thereafter the Respondents appealed to the Oklahoma Supreme Court. The Oklahoma Supreme Court retained jurisdiction of the two appeals and treated them as companion cases. App. 3. Due to Oklahoma Supreme Court Rule 1.36(g), "accelerated procedure", the parties below were not allowed to file appellate briefs in the Oklahoma Supreme Court. On July 8, 1997, the Oklahoma Supreme Court reversed the trial court's grant of summary judgment in the companion appeals and determined that under the McCarran-Ferguson Act, Federal Securities Laws are pre-empted by state regulations governing the conduct of "an insurer". In holding that the Oklahoma Securities Act does not apply to group self-insurers' associations, the Court gave retroactive effect to the recent amendment to Section 149.1. The Oklahoma Supreme Court denied the Petitioners' respective Petitions for Rehearing on March 9, 1998. App. 34. Pertinent quotations from the Petitioners' Petitions for Rehearing addressing the issues in this Petition and other issues, are set out in the Appendix at App. 73 and 80.

This Joint Petition seeks review of the Oklahoma decisions because it allows states to place an overly broad

restriction on federal power and bar legitimate protection under the Securities Act of 1933 (15 U.S.C. § 77a. et seq.), by applying another federal statute, the McCarran-Ferguson Act (15 U.S.C. § 1012). The Oklahoma Supreme Court has effectively held that the individual states have *sole*, unrestricted power with respect to regulating all conduct of an insurer; and additionally, because retroactive application of 85 O.S. § 149.1.C. prevents the Petitioners from applying the protection of the Oklahoma Securities Act, the ruling has violated the due process rights of the Petitioners under the Fourteenth Amendment to the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case for two reasons:

1. The Oklahoma Supreme Court has denied the Petitioners protection of federal securities laws on the sole basis that the McCarran-Ferguson Act "preempts" and displaces the provisions of federal securities laws regarding the issuance of ownership interests in an insurance company/association.

2. The Oklahoma Supreme Court has determined the Petitioners are not entitled to due process under the Fourteenth Amendment through retroactive application of a state law passed after the YWCA Petitioners won a favorable district court decision (and after Petitioner Colbert asserted a similar defense).

In so ruling, the Oklahoma Supreme Court "has decided an important question of federal law that has not been, but should be, settled by this Court"; and which "conflicts with relevant decisions of this Court".

PROPOSITION I: THE MCCARRAN-FERGUSON ACT SHOULD NOT APPLY TO NULLIFY FEDERAL SECURITIES LAWS

The Oklahoma Supreme Court has rewritten the McCarran-Ferguson Act to rationalize its deprivation of the protection of the federal securities laws to the Petitioners. If this opinion is allowed to stand, not only Oklahoma, but many other states, may rely upon the published opinions of the Oklahoma Supreme Court. This will deprive small business owners of the protection of the federal securities laws, including required disclosures to purchasers of interests in thousands of similar associations. The Oklahoma Supreme Court does *not* contend the interests are not securities, simply that as to the Securities Act of 1933, the McCarran-Ferguson Act preempts the Securities Act of 1933;[2] and that the 1996 Amendment to 85 O.S. § 149.1 exempts interests in these associations from Oklahoma State Securities laws. App. 10 and 19-22. See 15 U.S.C. § 77b.

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[2] At App. 28, the Oklahoma Supreme Court states "Without citation of authority Colbert contends the Oklahoma Employers Safety Group violated federal securities laws". This is a factually inaccurate statement. Excerpts from Colbert's Trial Court Briefs citing such authority are set out in the Appendix at App. 56-72.

The Oklahoma Supreme Court's opinion regarding the McCarran-Ferguson Act flies directly in the face of *Howlett By and Through Howlett v. Rose*, 496 U.S. 356 at 357, 110 S.Ct. 2430 at 2432, 110 L.Ed.2d 332 (1990), interpreting the supremacy clause to forbid state courts to disassociate themselves from federal law because of a disagreement with the content or refusal to recognize superior authority of its source.

Holloway v. Peat, Marwick, Mitchell & Co., 879 F.2d 772 (10th Cir. 1989 Okl.), cert. granted and vacated, *Peat Marwick Main & Co. v. Holloway*, 494 U.S. 1014 on remand 900 F.2d 1485 at 1488 (10th Cir. 1990), cert. denied, *KPMG Peat Marwick v. Holloway*, 498 U.S. 958 held that the State of Oklahoma could *not* displace the applicability of Federal Securities laws to issuers of passbook savings certificates, and held:

> " . . . By analogy, state regulation of the transaction should not be a factor governing application of the remedial federal securities laws. We therefore reaffirm our holding in *Holloway* that under the supremacy clause, U.S. Const. art. VI, cl. 2, our focus must be on *federal* regulation; state regulatory schemes cannot displace the Acts. *Id.* at 1488."

The Oklahoma Court's July 8, 1997 *Opinions* fail to support this principle.

The Respondents did not dispute their failure to comply with federal and state securities laws regarding the solicitation and sales of ownership interests in the associations (which would have enabled the Petitioners and other small business owners to make an informed decision to participate). Instead, the sole claim was that the

Petitioners were not afforded protection of *any* securities laws and no such information was required to be furnished to Petitioners.

SUBPROPOSITION IA: THIS COURT HAS PREVIOUSLY FOUND THE SECURITIES AND OTHER FEDERAL "ACTS" ARE NOT IMPEDED OR BARRED BY THE MCCARRAN-FERGUSON ACT

The McCarran-Ferguson Act, in part, states as follows:

> No act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless the act specifically relates to the business of insurance: . . .

See 15 U.S.C. § 1012(b).

Federal Securities Laws Decisions

In *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), this Court held that the Securities and Exchange Commission was not barred by the McCarran-Ferguson Act to enforce federal securities regulation of insurance securities on the basis that such laws would preempt state laws regulating insurance businesses. Therein, this Court further held that the McCarran-Ferguson Act does not make states "supreme" as to the regulation of activities of insurance companies.

> "In this case, Arizona is concerning itself with a marketedly different set of problems. It is

> attempting to regulate not the "insurance" relationship, but the relationship between a stockholder and the company in which he owns stock . . . The crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies. Such regulation is not within the scope of the McCarran-Ferguson Act."

SEC v. Nat'l Sec., Inc., 393 U.S. at 462, 89 S.Ct. at 569.

This rationale was followed by the federal district court of North Carolina in holding that the McCarran-Ferguson Act does not bar federal securities' claims arising out of the sale of an insurer's financial security plans. See *Liner v. DiCresce*, 905 F.Supp. 280 (M.D.N.C. 1994).

Other Decisions

In 1985, this Court further held that the McCarran-Ferguson Act does not bar or limit the applicability of the Equal Protection Clause to activities involving insurance companies. See *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985).

As recently as 1996, this Court has further clearly indicated that rights granted under federal laws specifically relating to the ability to sell insurance supersede state laws prohibiting such sales and that the "anti-preemption" language of the McCarran-Ferguson Act does not apply to allow the state law to displace or supersede the federal law. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 116 S.Ct. 1108, 134 L.Ed.2d 237 (1996).

SUBPROPOSITION IB: THE PETITIONERS ARE NOT IN THE "BUSINESS" OF INSURANCE

The principal elements for the application of the McCarran-Ferguson Act to deprive the Petitioners herein of the protection of federal securities laws were set forth by this Court in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 at 129, 102 S.Ct. 3002 at 3008, 73 L.Ed.2d 647 (1982). This Court therein held that among other elements, in order to "engage" the preemption of the McCarran-Ferguson Act, the term "engaging in the insurance business" must be applied *only* when three factors are met:

> " '*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.' " *Id.* at 2206.

This rationale was later supported by this Court in *Pilot Life Insurance Co. v. Bedeaux*, 481 U.S. 41 at 48-49, 107 S.Ct. 1549 at 1553-54, 95 L.Ed.2d 39 (1987). Clearly, the Petitioners are *not* entities within the insurance industry.

In fact, this Court has recently held that the term "business" in the McCarran-Ferguson Act refers to mercantile transactions, buying, selling and traffic of insurance (*not* selling of an interest in the insurance company itself). *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 at 781, 113 S.Ct. 2891 at 2901, 125 L.Ed.2d 612 (1993).

This rationale was followed by the District of Columbia Circuit Court of Appeals in 1996, when it held that selling a fractional interest in policies of insurance was

not the "business of insurance" necessary for the McCarran-Ferguson Act to exempt the application of federal securities laws. *Securities and Exchange Commission v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996).

This Court has also held that provider agreements with hospitals and doctors are not "the business of insurance" for purposes of the application of the McCarran-Ferguson exemption to anti-trust laws. *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979). The Fifth Circuit also held that methods of inducing borrowers to purchase insurance were not contemplated by Congress as the "business of insurance" exemption allowed by the McCarran-Ferguson Act. *Federal Trade Commission v. Dixie Finance Company, Inc.*, 695 F.2d 926 (5th Cir. 1983), cert. denied, 461 U.S. 928, 103 S.Ct. 2088, 77 L.Ed.2d 299 (1983).

SUBPROPOSITION IC: THERE IS NO STATE STATUTE THAT IS "INVALIDATED, IMPAIRED OR SUPERSEDED" NECESSARY TO APPLY THE EXEMPTION OF THE MCCARRAN-FERGUSON ACT

In 1993, this Court held that the McCarran-Ferguson exemption would not apply *unless* it were proven that there was a state statute that was invalidated, impaired or superseded by the application of the questioned federal statute. *U.S. Department of Treasury v. Fabe*, 508 U.S. 491 at 501, 113 S.Ct. 2202 at 2208, 124 L.Ed.2d 449 (1993). In the instant proceeding, the implication appears to be that Federal Securities laws impair Oklahoma's regulation of the associations pursuant to 85 O.S. 1996 § 149.1. However, there is no logical explanation *why* the application of the federal securities laws (to insure protection to small

business owners) will impair or impede any portion of the state's requirement that employers provide workers' compensation protection for their employees; or that requiring compliance with *both* Acts (85 O.S. § 149.1 and 15 U.S.C. § 77a et seq.) will not benefit all interested persons. Prudent public policy demands that the small business owners be given the federally intended protection from misrepresentation and omission in the sale of unregistered securities. This paramount federal interest of protecting purchasers is perfectly compatible with the state interest in ensuring that the small business owner secure workers' compensation benefits for their employees. See *SEC v. National Securities, Inc., supra,* 393 U.S. at 463, 89 S.Ct. at 570.

Accordingly, certiorari should be granted to review the decision of the Oklahoma Supreme Court as it has decided an important question of federal law that has not been, but should be settled by this Court as it relates to state group workers compensation associations, and in doing so has decided an important federal question in a way that conflicts with relevant decisions of this Court.

PROPOSITION II: THE OKLAHOMA SUPREME COURT'S RETROACTIVE APPLICATION OF A LEGISLATIVE AMENDMENT RENDERING STATE SECURITIES LAWS INAPPLICABLE TO A GROUP SELF-INSURER ASSOCIATION DIVESTED PETITIONERS OF A VESTED RIGHT TO A DEFENSE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Effective November 1, 1996, *after* (1) the YWCA Petitioners had prevailed in the District Court and (2)

Petitioner Colbert had asserted the "securities" issue as a counterclaim in the District Court, the Oklahoma legislature passed an amendment to 85 O.S. § 149.1. The amendment included the following new sub-part C, to wit:

> "A group self-insurer created pursuant to this section either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities Act."

The purchases of the interests in the Respondent associations had occurred years before the amendment's enactment or effective date. The Oklahoma Supreme Court's ruling, relying upon this new amendment to hold the Petitioners were not protected by the Oklahoma Securities Act, constituted an impermissible destruction of a defense, violating the due process clause of the Fourteenth Amendment to the U.S. Constitution. The due process clause prohibits any state from depriving any person of property "without due process of law". Prior to the Oklahoma Supreme Court's retroactive application of the amendment to 85 O.S. § 149.1., the Petitioners had vested rights in this defense under the provisions of the Oklahoma Securities Act. Title 71, Oklahoma Statutes § 1 et seq.

The retroactive application of Section 149.1.C destroyed a defense available to Colbert and was, therefore, an illegal taking of property. Defendant had more than just an expectation that the law would not change. Defendant had an accrued and vested contractual right prior to the November, 1996 amendment.

The Oklahoma Supreme Court on page 8 of its Opinion (App. 10 and 21), states that the amendment to 85

O.S. § 149.1 was a matter of "establishing a policy". The retroactive application of the amendment offends the due process clause in both the Constitution of the United States, and Oklahoma's own Constitution.[3] (See *McDonald v. Champion*, 962 F.2d 1455 (10th Cir. 1992, Okl.), cert. denied, 506 U.S. 890.

Additionally, federal legislation is subject to the same test as addressed by the Tenth Circuit Court of Appeals in *Lennox v. Evans*, 87 F.3d 431 at 432 (10th Cir. 1996 Okl.), citing to this Honorable Court, to wit:

> As specified by the Supreme Court, a statute has 'retroactive effect' when applied to a case filed prior to passage of the new legislation if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'

See *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 114 S.Ct. 1483 at 1505, 128 L.Ed.2d 229 (1994).

This Court in *Landgraf, supra*, also held that "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; . . . " *Id.* (511 U.S. 244 at 266) See also, *Landgraf, supra*, 511 U.S. at 270.

The Tenth Circuit has held that an amendment to a statute cannot retroactively invalidate a law which was in force when the incident in question occurred (herein, the

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[3] Article 5, Section 52, " . . . After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit."

sale of ownership interests in the group insurance associations). *Sellers v. Allstate Insurance Co.*, 82 F.3d 350 (10th Cir. 1996).

When the Oklahoma Supreme Court first raised the issue of retroactive application of the legislation in its Opinion (as to the YWCA Petitioners), it failed to consider the United States Constitution, Article I, Section 10, i.e., "Contract Clause", which provides: "No state shall . . . pass any . . . law impairing the obligation of contracts." The inquiry into the validity of state legislation under the contract clause has three components: "whether there is a contractual relationship, whether a change in the law impairs that contractual relationship, and whether the impairment is substantial". *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). The "threshold inquiry is whether state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 at 244, 98 S.Ct. 2716 at 2722, 57 L.Ed.2d 727 (1978).

The laws in existence at the time of the contract enter into and form a part of the contract as if they were expressly referred to or incorporated in its terms. See *Home Building Loan and Association v. Blaisdell*, 290 U.S. 398 at 429-430, 54 S.Ct. 231 at 237, 78 L.Ed. 413 (1934). There is a presumption that contracting parties adopt the terms of their bargain in reliance upon the law in effect at the time. *United States Trust Company of New York v. New Jersey*, 431 U.S. 1 at 19, 97 S.Ct. 1505 at 1516, 52 L.Ed.2d 92 (1977).

Thus, the retroactive application of 85 O.S. § 149.1.C allows the offending group insurance associations to escape from complying with obligations under Oklahoma securities laws in effect at the time of contracting. Thereby, the group self-insurance associations are allowed to avoid the consequences of their prior failure to comply with the law in effect at the time of the agreement. This completely changes the contractual relationship between the parties, to the detriment of the small business owners.

Accordingly, certiorari should be granted to review the decision of the Oklahoma Supreme Court as it has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

CONCLUSION

In the opinions sought to be reviewed the Oklahoma Supreme Court has completely denied small business owners in the State of Oklahoma (1) the protection of federal securities laws based upon the preemption language of the McCarran-Ferguson Act; and (2) the protection of the Oklahoma Securities laws by allowing the retroactive application of a substantive legislative amendment. If the Oklahoma Supreme Court opinions are allowed to stand, they will be relied upon, not only as precedential authority in the State of Oklahoma, but persuasive authority throughout the many states allowing sales of ownership interests in similar group associations. These issues must be addressed by this Court to require such insurance associations to "speak the truth" when

soliciting the unwary small business owner; as well as protect vested rights of due process afforded citizens of the United States.

Respectfully submitted,

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APPENDIX CONTENTS

Decision of the Oklahoma Supreme Court, July 8, 1997 (SIMG) ..... App. 1

Decision of the Oklahoma Supreme Court, July 8, 1997 (OESG) ..... App. 15

Final Journal Entry of Judgment – Limited as to certain parties and issues, January 18, 1996, District Court of Oklahoma County, Oklahoma (SIMG) ..... App. 25

Judgment, January 24, 1997, District Court of Oklahoma County, Oklahoma (OESG) ..... App. 31

Order of the Oklahoma Supreme Court Denying Rehearing, March 9, 1998 ..... App. 34

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV ..... App. 36

STATUTES

15 U.S.C. § 77e ..... App. 36

15 U.S.C. § 77l ..... App. 38

15 U.S.C. § 77j ..... App. 39

15 U.S.C. § 1012 ..... App. 41

71 O.S. Supplement 1997 § 301 ..... App. 42

71 O.S. Supplement 1997 § 408(a)(1) and (2)(A) ... App. 43

71 O.S. Supplement 1997 § 408(i) ..... App. 43

85 O.S. Supplement 1996 § 149.1 ..... App. 44

APPENDIX CONTENTS – Continued

PERTINENT QUOTATIONS THAT SHOW THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED:

YWCA's District Court Motion For Summary Judgment filed July 31, 1995.....App. 46

Colbert's District Court Motion For Summary Judgment and Response in Opposition to Motion For Summary Judgment of OESG and Brief in Support.....App. 56

Colbert's District Court Reply to Response of Oklahoma Employers Safety Group, S.I.A's Response to Colbert Nursing Home, Inc.'s Motion For Summary Judgment and Reply...App. 63

Colbert's District Court Reply to Oklahoma Employers Safety Group, S.I.A.'s Supplemental Response.....App. 69

Colbert's Oklahoma Supreme Court Petition For Rehearing and Brief in Support.....App. 73

YWCA's Petition For Rehearing and Brief in Support filed in the Oklahoma Supreme Court ..App. 88

1997 OK 95

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

SELF INSURERS' MANAGEMENT GROUP, Plaintiff/Appellant, v. THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, C & H POWER LINE, CHRIS HUNT WATER HAULING and JOHN VANCE MOTORS, Defendants/Appellees.	No. 86,718 (companion with No. 88,818) (Filed Jul. 8, 1997) **FOR OFFICIAL PUBLICATION**

APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE NILES JACKSON, JUDGE

The trial court entered summary judgment for the thirteen Defendants/Appellees listed in the style, and against Plaintiffs/Appellants, Self Insurors' Management Group, known as the Association. The Association sued the Defendants/Appellees and others for breach of contract. Defendants/Appellees and hundreds of others were members of the Association. The Association's members

were self insured employers who, under the authority of 85 O.S. 1981 § 149.1, had joined together through the Association to obtain workers' compensation insurance in exchange for premiums paid by each member. The Association sued certain of its members, including Defendants/Appellees, for non payment of premiums. The trial court granted summary judgment against the Association on the grounds that (1) the agreements between the parties were unregistered securities and for that reason could not be enforced against Defendants/Appellees, and (2) the agreements violated Workers' Compensation Court rules in that Defendants/Appellees had no common interest in obtaining workers' compensation insurance because there was "no recognizable common purpose" between them for combining to buy insurance. On January 18, 1996, the trial court entered a Final Journal Entry of Judgment Limited as to Certain Parties and Issues holding as indicated above. The Association appeals from the trial court's Final Journal Entry.

JUDGMENT REVERSED AND
REMANDED WITH INSTRUCTIONS

Larry Derryberry, David B. Dykeman, Derryberry, Quigley, Parrish & Solomon Oklahoma City, Oklahoma For Appellant.

Bradley D. Brickell, Mahaffey & Gore, Oklahoma City, Oklahoma For Appellees.

WATT, Justice.

This is an appeal from the judgment of the District Court of Oklahoma County, Oklahoma, Honorable Niles

Jackson, Judge. The trial court granted summary judgment for the thirteen Defendants/Appellees listed in the style of this appeal, and against Plaintiff/Appellant, Self Insurors' Management Group. On October 21, 1996, we withdrew this case from assignment to the Court of Civil Appeals because of its important public policy implications. On January 31, 1997 we ordered that jurisdiction be retained in this appeal and that it be made a companion case with *Oklahoma Employers Safety Group, S.I.A. v. Colbert Nursing Homes, Inc.*, No. 88,818, ___ OK 1997, ___ P.2d ___ (Okla. 1997), decided this day, because it involves the same important public policy issues.

FACTS AND PROCEDURAL HISTORY

In 1981 the Legislature passed 85 O.S. 1981 § 149.1, which directed that "The Workers' Compensation Court shall adopt rules permitting two or more employers . . . to pool together liabilities under this act for the purpose of qualifying as a group self insurer. . . . " Section 149.1 allowed small employers to pool their risks of workers' compensation liabilities and, thereby, spread their risk of loss among a far larger group of employers than an individual employer could do. By joining a group self-insurer, employers could avoid paying the profit built into a commercial insurance company's workers' compensation premiums. Those employers joining in the group however, jointly and severally undertook the risk of loss that insurance companies would otherwise have assumed.

In 1982 the Workers' Compensation Court approved Self Insurors' Management Group, then known as the

Oklahoma City Drillers Association, to act as a group self-insurance association in accordance with § 149.1. The Association, with the approval of the Workers' Compensation Court, changed its name to Self Insurors' Management Group in 1984.

During the mid 1980s several hundred small employers, including the Defendants/Appellees, joined the Association. In 1989 the Association ceased to provide new coverages for its members because of heavy underwriting losses, but was authorized by the Administrator of workers' compensation to continue business in order to wind up its affairs.

This long and tortured litigation began on November 3, 1989 when the Association filed this suit against hundreds of its members, including Defendants/Appellees. It sued for breach of its Application for Membership, Indemnity Agreement, and Power of Attorney that each of its members had executed upon joining the organization. Such agreements were required by Rule 3 of the Workers' Compensation Court's Rules, which governed group self-insurers. The Agreement stated that

> Each and every Member jointly and severally agrees to assume, pay and discharge any liability under the [Workers' Compensation] ACT of any and all members of the ASSOCIATION and each Member agrees to pay any assessments as may be required by the BOARD [of Directors of the Association].

In its original petition, the Association sought to require the payment of unpaid assessments that its members had failed to pay in violation of the terms of the Agreement. The Association filed an amended petition on

March 31, 1994 claiming that each named defendant was jointly and severally liable for $2,500,000, which was the aggregate amount owed to the Association by its members to cover the Association's losses. Earlier, on December 3, 1991, the District Court of Oklahoma County, while the case was assigned to Judge Virgil C. Black, denied the "Defendants Motion for Summary Judgment" on the ground that the Agreements did not violate the securities laws. The record does not identify which defendants the 1991 order referred to, as those defendants' motion for summary judgment was not made a part of the record on appeal.

On July 31, 1995 the Defendants/Appellees filed a motion for summary judgment in which they claimed that (1) the Agreements were unregistered securities and, therefore, illegal, unenforceable, and void; and (2) Plaintiff materially breached the Agreements. The trial court granted summary judgment for Defendants/Appellees and as part of its order allowed for an immediate appeal. This part of the order was made necessary because other defendants were not parties to Defendants/Appellees motion for summary judgment.

In its order, entitled "Final Journal Entry of Judgment Limited as to Certain Parties and Defendants," the trial court confirmed its order granting Defendants/Appellees summary judgment and overruled Plaintiff's motion for new trial. The trial court based its ruling in favor of Defendants/Appellees on the following conclusions: (1) the Agreements were unregistered securities and could not be enforced against Defendants/Appellees, and (2) Plaintiff materially breached the Agreements because there was "no recognizable purpose for associating"

among Association's members, in violation of Workers' Compensation Court Rules. The Rules relied on by the trial court, Rule 3, Sections 3(b) and (d), provide:

> (b) "Group self-insurance association" or "association" means an association organized by two or more employers having a common interest which have entered into agreements under the Oklahoma Workers' Compensation Act.
>
> . . .
>
> (d) "Common interest" means employers engaged in the same or similar types of business or who otherwise have a recognizable common purpose for associating. . . .

ISSUES

> (1) Were the Agreements unregistered securities and therefore unenforceable against Defendants/Appellees?
>
> (2) Did the trial court correctly rule that the Agreements violated Workers' Compensation Court rules because there was no "common interest" between the Association's members?

We answer no to each question.

DISCUSSION

I.

In this part of our opinion we will consider whether the Association's Agreements with its members violated the Oklahoma Securities Act. For the reasons set forth in the balance of this part of the opinion we believe that the Agreements did not violate the Oklahoma Securities Act.

In 1996 the Legislature amended 85 O.S. Supp. 1996 § 149.1 by adding subsection C, which states:

> A group self-insurer created pursuant to this section either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities Act.

This amendment to § 149.1 makes abundantly clear the Legislature's intention that the agreements of all members of all associations created under the terms of § 149.1, including the Agreements at issue here, are not covered by the Oklahoma Securities Act. We note that the trial court ruled that the Securities Act was violated without the benefit of the Legislature's clear mandate to the contrary in its 1996 amendment to § 149.1.

Defendants/Appellees rely on the rule that the validity of a judgment must be measured by the law in force when it was rendered, citing *Evans v. Evans*, 852 P.2d 145 (Okla. 1993). The *Evans* rule does not apply here for two reasons. First, the judgment at issue in *Evans* was a final judgment. Here, however, the Defendants/Appellees' judgment was not final, as the Association filed a timely appeal. Second, the judgment at issue in *Evans* was a property division decree in a divorce case, and, under 42 [sic] O.S.1991 § 134.A, property division provisions in divorce decrees are "irrevocable and not subject to subsequent modification." *Evans*, 852 P.2d at 148. The issue in *Evans* was whether subsequent legislation making military retirement benefits reachable in divorce actions changed the rule established by 42 [sic] O.S. § 134. We held that the property division decree remained effective under 42 [sic] O.S. § 134. By contrast to *Evans*, no express Oklahoma law made group self-insurance agreements

subject to the Oklahoma Securities Act before the 1996 amendment to § 149.1. In fact, it seems clear to us that the Legislature amended § 149.1 to clarify what it perceived the law to have been since the passage of § 149.1 in 1981.

Defendants/Appellees also contend that they have a vested right in the trial court's determination that the Agreements were void as being contrary to the Oklahoma Securities Law, so that § 149.1.C should not be applied retroactively, despite its clear language. We disagree. Defendants/Appellees rely on *Texas County Water Irr. and Water Resources Ass'n v. Oklahoma Water Resources Bd.*, 803 P.2d 1119 (Okla. 1990). That case, does not support Defendants/Appellees position. There we held that where a prior enactment is ambiguous there is a presumption that subsequent legislation amending the act "was designed to clarify its text." This is the situation before us here. Defendants/Appellees do not suggest what it is that gave them a vested interest in the trial court's decision, and we see nothing that could have done so.

The Legislature has established a clear public policy that compensation to employees covered by the Workers Compensation Act be secured. Title 85 O.S. Supp. 1994 § 61 requires that compensation shall be secured either through insurance or through a self-insurance arrangement establishing the employer's ability to pay. In 1993 the Legislature added Subsection B to § 61, which provides:

> An employer upon application to become a member of a group self-insurance association shall file with the Administrator of the Workers' Compensation Court a notice . . . acknowledging that the employer by entering into the group

> self-insurance association, accepts joint and several liability. Such notice shall be submitted to the Workers' Compensation Court with the application for membership.

Under Section 6 of Rule 3, every applicant for membership in a group self-insurance association must file with the Workers' Compensation Court an application form, which the Workers' Compensation Court must approve before an applicant may become a member of a group self-insurance association. In its application, each applicant for membership must "include evidence of the execution of the indemnity agreement and power of attorney required by Section 12 [of Rule 3]." Thus, Defendants/Appellees are bound to joint and several liability under the Workers' Compensation Court Rules, as well as under the Agreement. The clear purpose of this requirement is to insure that there will be funds to pay workers' compensation awards to injured workers.

Defendants/Appellees claim that they were entitled to assert Oklahoma Securities Act defenses before the 1996 amendment to § 149.1. But this is not necessarily so. Section 149.1 was silent with respect to whether the Securities Act would apply to agreements made under its terms. Thus, there was no statutory or case law indication prior to the trial court's ruling to support Defendants/Appellees claim that Defendants/Appellees have a vested interest in having their Agreements deemed securities.

In passing § 149.1 and allowing employers to join group self-insurance associations, the Legislature meant to provide security for workers' compensation payments

to employees of such associations. To carry out this public policy, the Legislature decided that members of group self-insurance associations would not be covered by the Oklahoma Securities Act. This was a policy decision with retroactive effect on the existing Self Insurors' Management Group regimes now in force, to which this Court will defer.

Because of our conclusion that the Securities Act does not apply here, we deny the Application for Leave to File Amicus Curie Brief filed by several former members of group self-insurer associations. The proposed amicus brief deals exclusively with whether agreements made under the pre 1996 version of § 149.1 are securities under the Oklahoma Securities Act. The Legislature, by its 1996 amendment to § 149.1 established as a matter of Oklahoma public policy that such agreements are not covered by the Securities Act, thus whether such agreements would have been securities had the Securities Act applied to them is irrelevant to the issues before us.

Because § 149.1 was not amended until after the trial court ruled in this matter, the matter must be assessed in the first instance by the trial court. *American Insurance Association v. State Industrial Commission*, 745 P.2d 737, 740 (Okla. 1987). We therefore reverse and remand this matter to the trial court with instructions to proceed in a manner consistent with this opinion, and with our opinion in the companion case, *Oklahoma Employers Safety Group, S.I.A. v. Colbert Nursing Homes, Inc.*, No. 88,818, ___ OK 1997, ___ P.2d ___ (Okla. 1997).

II.

The Association appeals from the trial court's ruling that there was no disputed issue of material fact as to whether there was a "recognizable common purpose for [the Association's members] associating." We hold that the trial court erred.

Rule 3, Section 3(b), of the Workers' Compensation Court's Rules, the Rule governing group self-insurer associations, requires that the members of a self-insurance association have a "common interest." Section 3(d) says that " 'Common interest' means employers engaged in the same or similar types of business *or who have a recognizable common purpose for associating.*" [Emphasis added.] Defendants/Appellees would have us hold that the Association's members had no "common interest" in associating themselves with the Association because the members' businesses were dissimilar. We find this contention unconvincing because it ignores the emphasized portion of Section 3(d) set out above. The Workers' Compensation Court expressly authorized group self-insurers to have members who had a "recognizable common purpose for associating." We hold that the broad standard of Section 3(d) encompasses those members who joined because they were willing to take the risk of being self insured in return for the possibility that they would pay less for group self-insurance than for private insurance.

Section 4 of Rule 3 provides that the Workers' Compensation Court will review the applications of all group self-insurance associations "on an annual basis to determine continued compliance with the law and these

regulations." Presumably, therefore, the Workers' Compensation Court was aware that the Association had members whose businesses were dissimilar, but the record does not reflect that the Workers' Compensation Court objected to it. As noted earlier, Rule 12 requires that every member of a group self-insurance association execute an indemnity agreement "subject to the approval of the Court," and 85 O.S. Supp. 1994 § 61.B requires applicants for membership in an association to file with the Workers' Compensation Court a notice acknowledging its acceptance of such liability. We conclude, therefore, that the trial court erred in holding that Workers' Compensation Court's Rules prohibited dissimilar businesses from joining a group self-insurance association. We hold that the association of Defendants/Appellees here was appropriate under the statutes and Workers' Compensation Court Rules.

In addition to the two issues before us today, the trial court considered and denied Defendants/Appellees' motion for summary judgment on the issues of whether joint liability could be imposed against Defendants/Appellees and whether the Association breached the Agreements by failing to hold annual elections of its supervisory board. While those issues are not expressly before us today, we observe for the benefit of the trial court and the parties on remand of this matter that both the statutes and the Workers' Compensation Court Rules relating to group self-insurance associations require members of such associations to accept joint and several liability as a condition of membership. 85 O.S. Supp. 1994 § 61.C; Rule 3, Section 12, Rules of the Administrator of the Workers' Compensation Court.

Defendants/Appellees' contention that breach of the failure to hold elections of the Association's Board is equally unpersuasive. Section 11 of Rule 3, Rules of the Administrator, explicitly requires the Association to make up any deficits it may sustain by, among other means, "assessment of the membership."

Finally, the relevance of the Association's failure to hold elections as an excuse for Defendants/Appellees' failure to comply with the clear requirements of the Rules escapes us. There is nothing in the record to indicate that any of the Defendants/Appellees expressed any concern on this score prior to being sued by the Association.

CONCLUSION

Because § 149.1 was not amended until after the trial court ruled in this matter, the matter must be assessed in the first instance by the trial court. We therefore direct that on remand the trial court afford Defendants/Appellees the opportunity to litigate the issue in the trial court and thereafter rule in a manner consistent with this opinion and our opinion in the companion case. The trial court erred in holding that the Association breached the Agreements by allowing members having dissimilar businesses to join the Association. We therefore reverse and remand this matter to the trial court with instructions to proceed in a manner consistent with this opinion, and with our opinion in the companion case.

JUDGMENT REVERSED AND
REMANDED WITH INSTRUCTIONS

KAUGER, C.J., SUMMERS, V.C.J., HODGES, OPALA, and WATT, JJ. – concur.

SIMMS, J. – concurs in result only.

LAVENDER, HARGRAVE, and WILSON, JJ. – concur in part, dissent in part.

1997 OK 94

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A., Plaintiff/Appellant, v. COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation, Defendant/Appellee, and Third Party Plaintiff, v. DAVID DANK, Third Party Defendant.	No. 88,818 (companion with No. 86,718) (Filed Jul. 8, 1997) **FOR OFFICIAL PUBLICATION**

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE NILES JACKSON, JUDGE

Appeal from the judgment of the District Court of Oklahoma County, Honorable Niles Jackson, Judge, granting summary judgment for Defendant/Appellee, Colbert Nursing Home, Inc., Oklahoma Employers Safety Group, Plaintiff/Appellant, also moved for summary judgment, which the trial court denied. Oklahoma Employers Safety Group sued Colbert for nonpayment of premiums under a workers' compensation group self-insurance agreement made under 85 O.S. 1981 § 149.1. Section 149.1 authorizes Oklahoma employers to join

group self-insurance associations for the purpose of providing workers' compensation insurance. The trial court's judgment did not state its grounds for granting summary judgment to Colbert. The trial court entered judgment under 12 O.S. 1991 § 994.A as to Oklahoma Employers Safety Group and Colbert. The issues involving the third party defendant David Dank remain unresolved and Dank is not a party to this appeal. Colbert's brief in support of its motion for summary judgment, however, was grounded on three theories, which Colbert claimed made the Agreement void and unenforceable: (1) state securities laws violations, (2) federal securities law violations, and (3) Oklahoma Employers Safety Group's failure to comply with Workers' Compensation Court Rules. We retained jurisdiction of this appeal due to the important public policy issues involved, and made it a companion case with *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718, ___ P.2d ___ (Okla. 1997), also decided today.

JUDGMENT REVERSED AND
REMANDED WITH INSTRUCTIONS.

Don R. Nicholson, II, Mark J. Pordos, Kent A. Nicholson, Getulio C. "Bud" Newberry, Eagleton & Nicholson, P.C., Oklahoma City, for Plaintiff/Appellant.

Clifford A. Wright, Clifford A. Wright, P.C., Oklahoma City, Oklahoma, Attorney for Defendant.

WATT, Justice.

The Facts and legal issues of this appeal are similar to those before us in *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718, ___ P.2d ___

(Okla. 1997), also decided today. Oklahoma Employers Safety Group moved that this Court retain jurisdiction of this appeal and make it a companion case to the *Self Insurors' Management Group* appeal. We granted Oklahoma Employers Safety Group's motion on January 31, 1997. We did so because both this case and *Self Insurors' Management Group* present the same important issue of public policy dealing with the construction of a recent amendment to 85 O.S. Supp. 1996 § 149.1.

FACTS

On August 2, 1996, Oklahoma Employers Safety Group sued Colbert Nursing Homes, Inc for unpaid workers' compensation insurance premiums of $58,060. Oklahoma Employers Safety Group is a group self-insurance association formed under 85 O.S.1991 § 149.1 for the purpose of allowing multiple employers to join together to provide workers' compensation insurance. Oklahoma Employers Safety Group is regulated by the Workers' Compensation Court, as mandated by § 149.1. Colbert is one of Oklahoma Employers Safety Group's members. Colbert filed an answer and counterclaim alleging that Oklahoma Employers Safety Group had breached its Agreement with Colbert, and that the Agreement was unenforceable because it was an unregistered security.

When it was formed, Oklahoma Employers Safety Group's bylaws provided that its members' supervisory board would be appointed by Oklahoma Employers Safety Group's president, although the Workers' Compensation Court Rules relating to group self-insurance associations provided that board members should be

elected by each association's members. On November 10, 1993 Oklahoma Employers Safety Group amended its bylaws to provide for election of its board by Oklahoma Employers Safety Group's members in accordance with Workers' Compensation Court Rules. Colbert did not begin to receive workers' compensation coverage from Oklahoma Employers Safety Group until August 25, 1994.

Colbert terminated its coverage with Oklahoma Employers Safety Group effective March 1, 1996, and requested an audit of its account. Oklahoma Employers Safety Group's audit showed that Colbert owed $58,060.00 in additional premiums. When Colbert refused to pay the additional premiums, Oklahoma Employers Safety Group filed this action.

Both Oklahoma Employers Safety Group and Colbert moved for summary judgment. The trial court granted Colbert's motion for summary judgment and denied Oklahoma Employers Safety Group's motion for summary judgment. The trial court's judgment did not state its grounds for granting summary judgment to Colbert. Colbert's brief in support of its motion for summary judgment, was grounded on three theories, which Colbert claimed made the Agreement void and unenforceable: (1) state securities laws violations, (2) federal securities law violations, and (3) Oklahoma Employers Safety Group's failure to comply with Workers' Compensation Court Rules. Oklahoma Employers Safety Group resisted Colbert's motion for summary judgment, and supported its own motion for summary judgment, by claiming that the amendment to § 149.1 made the Oklahoma securities Act unavailable to Colbert. The trial court granted judgment under 12 O.S.1991 § 994.A, so that Oklahoma Employers

Safety Group could appeal the judgment. The basis of the trial court's application of § 994.A was that the judgment was final as between Oklahoma Employers Safety Group and Colbert, but left unresolved all issues involving the third party defendant, David Dank. That this is the case is undisputed.

ISSUES

(1) Were the Agreements unregistered securities and therefore unenforceable against Defendants/Appellees, under either state or federal securities laws?

(2) Were the Agreements void because Oklahoma Employers Safety Group's bylaws violated Workers' Compensation Court rules concerning election of its members' supervisory board prior to Colbert's joining Oklahoma Employers Safety Group?

We answer no to each question.

DISCUSSION

I.

The Oklahoma Securities Act is Not Available to Colbert as A Defense to Oklahoma Employers Safety Group's Action.

Our discussion in Part I of the companion case to this matter, *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718, ___ P.2d ___ (Okla. 1997), also decided today, disposes of Colbert's claim that its Agreement with Oklahoma Employers Safety Group violated the Oklahoma Securities Act. The Legislature has implemented an important public policy of making sure

that payment of workers' compensation benefits to injured workers are secured. In doing so the Legislature has mandated in 85 O.S. Supp. 1996 § 149.1.C that

> A group self-insurer created pursuant to this section [149.1] either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities act.

Because of § 149.1.C, and for the reasons stated in *Self Insurors' Management Group*, we hold that the Oklahoma Securities Act is not available to Colbert here, and the trial court, therefore, erred in granting Colbert's motion for summary judgment on this issue and denying Oklahoma Employers Safety Group's motion for summary judgment.

Federal Securities Laws do Not Apply to the Facts of This Appeal.

Without citation of authority Colbert contends that Oklahoma Employers Safety Group violated federal securities laws. We disagree.

The Oklahoma Legislature authorized the formation of group self-insurance associations to provide another method whereby employers could provide workers' compensation insurance. In authorizing such associations under § 149.1, the Legislature provided that the Workers' Compensation Court would regulate such associations. The McCarran-Ferguson Act governs here. The Act provides:

> No act of congress shall be construed to invalidate, impair or supersede any law enacted by

> any state for the purpose of regulating the business of insurance. . . .

15 U.S.C. § 1012(b).

It is clear that Oklahoma Employers Safety Group's primary business was to provide workers' compensation insurance to its members, and that Colbert's primary purpose for joining Oklahoma Employers Safety Group was to obtain such insurance. Further, such associations and their members are regulated under the Oklahoma statutes and Workers' Compensation Court Rules. Under the McCarran-Ferguson Act, federal securities laws do not apply when state regulations govern the conduct of an insurer. *Federal Trade Com'n v. National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958). As shown in our discussion in *Self Insurors' Management Group*, the Workers' Compensation Court Rules and Title 85 do regulate group self-insurers.

There is another and equally important reason why state law must prevail here. In this appeal, Colbert and Oklahoma Employers Safety Group's other members are not primarily investors. Instead, they are employers with statutory responsibility to secure payment of workers' compensation benefits to their injured employees. To the extent, if any, that group members could be said to be investors, their rights as investors must be held to be secondary to their responsibilities as employers. When it passed § 149.1.C the Legislature established a policy that such employers have no rights under state securities law. The legislation called for a comprehensive scheme of regulation, which has been implemented by the Workers' Compensation Court. Under these circumstances the

McCarran-Ferguson Act mandates that federal securities laws do not apply.

II.

Colbert claims that it is immune from liability here because Oklahoma Employers Safety Group breached the Agreement by failing to follow Workers' Compensation Court Rules relating to the manner in which Oklahoma Employers Safety Group's members' supervisory board was selected. In support of its contention, Colbert relies on *Stoltz, Wagner & Brown v. Cimarron Exploration Co.*, 564 F.Supp. 840 (W.D.Okla. 1981); *Miller v. Young*, 197 Okla. 503, 172 P.2d 994 (1946); and *Houser v. Sheehan*, 389 P.2d 94 (Okla. 1964). The cited cases do not fit the facts of this appeal. In each of those cases the plaintiff fundamentally breached the agreement upon which it sued. The rule established by these cases is that such a breach

> . . . is grounds for recission of a contract when such failure defeats the object of the contract or when it concerns a matter of such importance that the contract would not have been made if default in that particular area had not been expected.

Stoltz, 564 F.Supp. at 849; *Houser*, 389 P.2d at 97. In *Stoltz* plaintiff diverted $225,000.00 of well cost money that caused defendants well costs to increase dramatically. *Houser*, and *Miller* also involved breaches by parties who, by those breaches, had clearly hurt their opponents in the litigation. (*Houser*: breach of agreement that survivor of husband and wife would have the use of all the couple's

joint property; *Miller*: plaintiff failed to complete a building contract in violation of his agreement with defendants.) Here, there is no showing that the failure of the membership to elect the board damaged Colbert. Indeed, the claimed breach of the Agreement had been cured by the time Colbert joined Oklahoma Employers Safety Group in 1994 because Oklahoma Employers Safety Group amended its bylaws to comply with Workers' Compensation Court Rules in 1993. There was no basis in the record to support granting Colbert summary judgment on the ground that Oklahoma Employers Safety Group had breached the Agreement.

CONCLUSION

For the reasons stated in the companion case, *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718, ___ P.2d ___ (Okla. 1997), we hold 85 O.S. Supp. 1996 § 149.1.C precludes Colbert from relying on the Oklahoma Securities Act as a defense to Oklahoma Employers Safety Group's action against it. Further, Oklahoma Employers Safety Group's noncompliance with Workers' Compensation Court Rules concerning the manner in which its board members were selected is not available to Colbert as a defense. The record does not support the trial court's grant of summary judgment to Colbert. We reverse and remand this matter to the trial court with instructions to proceed in a manner consistent with this opinion and with our opinion in the companion case, *Self Insurors' Management Group v. The YWCA of Oklahoma City, et al.*, No. 86,718.

JUDGMENT REVERSED AND REMANDED WITH INSTRUCTIONS.

KAUGER, C.J., SUMMERS, V.C.J., HODGES, OPALA, and WATT, JJ. – concur.

SIMMS, J. – concurs in result only.

LAVENDER, HARGRAVE, and WILSON, JJ. – concur in part, dissent in part.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

SELF INSURORS MANAGEMENT GROUP,	)	Case No. CJ-89-9984
Plaintiff,	)	(Filed Jan. 18, 1996)
v.	)	
THE YWCA, et al.,	)	
Defendants,	)	
THE YWCA, et al., on behalf of themselves and all similarly situated members/shareholders of Self Insurors Management Group,	)	
Third-Party Plaintiffs,	)	
v.	)	
CHRIS STURN, individually, and SELF INSURORS MANAGEMENT GROUP,	)	
Third-Party Defendants.	)	

FINAL JOURNAL ENTRY OF JUDGMENT – LIMITED AS TO CERTAIN PARTIES AND ISSUES

This matter came on for hearing pursuant to Motions for Summary Judgment filed by certain of the Defendants. The Court, having had the matter under advisement and the Defendants hereinafter named having filed

briefs, responses, replies and other pleadings and pertinent materials, hereby directs the preparation and filing of this final judgment on the express determination that there is no just reason for delay. This final judgment should be filed adjudicating fewer than all claims, or rights and liabilities of fewer than all parties and shall not terminate the action as to any of the other claims or parties in order that this Court's Order(s) adjudicating summary judgment on October 5, 1995, and the Plaintiff's following Motion for New Trial, overruled on November 28, 1995, may become final for purposes of immediate appeal.

THE COURT HEREBY FINDS that the following Defendants are entitled to summary judgment in their favor and against the Plaintiff on the Plaintiff's claims in its Petition, as amended March 31, 1994, seeking judgment against said Defendants in the amount of $2,500,000.00, both jointly and severally. Those Defendants having so moved and being entitled to such judgment are: The YWCA of Oklahoma City, Century Martial Arts Supply, Inc., E & H Transfer, Inc., City Glass Co., C & H Power Line Construction, Inc., Chris Hunt Water Hauling, Oklahoma Steel & Wire, Inc., Flip's Wine Bar & Trattoria, Inc., Mangum Brick Company, Ronnie's Signs, Inc., Dalmarc Enterprises Incorporated, Barbara J. Wilson, John Vance Motors and Troy Wesnidge.

THE COURT FURTHER FINDS, pursuant to the undisputed material facts propounded by said Defendants in their Motions for Summary Judgment and supported by admissible evidence, as well as by Plaintiff's response to said Motions for Summary Judgment, that all

material facts necessary to grant said Defendants summary judgment on two (2) of their affirmative defenses were admitted or are deemed admitted pursuant to Rule 13 for the Rules of the District Courts for the State of Oklahoma.

THE COURT FURTHER FINDS that the herein-named Defendants have and take summary judgment as per affirmative defenses against the Plaintiff on Plaintiff's Petition, as amended on March 31, 1994; that Plaintiff's Motion for New Trial is overruled; and that Plaintiff take nothing against said Defendants on the claims for collection of indebtedness under the terms of the Application for Membership, Indemnity Agreement and Power of Attorney, or any other agreement or contract between the Plaintiff and said Defendants.

THE COURT FURTHER FINDS the herein-named Defendants are entitled to summary judgment as a matter of law on their Motion for Summary Judgment filed on August 21, 1995, on the grounds that the "agreements are unregistered securities and void" against Plaintiff's claims of indebtedness under the agreements entitled "Application for Membership, Indemnifying Agreement and Power of Attorney." This ruling is made on the basis that the agreements under which Plaintiff's action is brought constitute unregistered securities and therefore cannot be enforced against said Defendants.

THE COURT ADDITIONALLY FINDS that said Defendants are entitled to summary judgment based on their affirmative defense that the Plaintiff materially breached the agreement it now attempts to enforce which was argued and supported in their Motion for Summary

Judgment filed on July 31, 1995. The undisputed material facts as submitted by said Defendants, as well as Plaintiff's admissions under District Court Rule 13, show it was admitted that there was no common interest, i.e., "no recognizable common purpose for associating" as required by the Rules of the Worker's Compensation Court. Clearly, the Plaintiff was required by law and pledged in the indemnity agreement which it is attempting to enforce, that it would comply with the rules and regulations of the Worker's Compensation Court. The "applications for membership and indemnity agreements" signed by both the Defendants and the Plaintiff are rendered unenforceable by the Plaintiff due to the Plaintiff's actions in violating the Rules of the Worker's Compensation Court, revised in 1986, Section 3(B). Section 3(B) states: "a group of self-insured association means an association organized by two or more employers having a common interest which have entered into an agreement to pool their liabilities under the Oklahoma Worker's Compensation Act". The Rules of the Worker's Compensation Court were promulgated under 85 Okla. Stat. § 149.1.

THE COURT FURTHER FINDS that the Plaintiff's compliance with said law was required under the terms of the contract and under common law of the State of Oklahoma; therefore the indemnity agreements, i.e., "Application for Membership, Indemnifying Agreement and Power of Attorney" are unenforceable by the Plaintiff, because Plaintiff materially breached said agreements.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following Defendants have and take summary judgment as per affirmative defenses set forth in the above findings against the Plaintiff on Plaintiff's

Petition, as amended on March 31, 1994; that Plaintiff's Motion for New Trial is **OVERRULED**; and that Plaintiff take nothing against said Defendants on the claims for collection of indebtedness under the terms of the Application for Membership, Indemnity Agreement and Power of Attorney or any other agreement or contract between the Plaintiff and said Defendants. **THE COURT SPECIFICALLY FINDS** that there is no just reason for delay and that this judgment should be filed for the express purpose of granting a right to immediate appeal. Defendants The YWCA of Oklahoma City, Century Martial Arts Supply, Inc., E & H Transfer, Inc., City Glass Co., C & H Power Line Construction, Inc., Chris Hunt Water Hauling, Oklahoma Steel & Wire, Inc., Flip's Wine Bar & Trattoria, Inc., Mangum Brick Company, Ronnie's Signs, Inc., Dalmarc Enterprises Incorporated, Barbara J. Wilson, John Vance Motors and Troy Wesnidge **are hereby awarded judgment in this action against the Plaintiff,** along with their costs.

Dated this 17 day of January, 1996.

/s/ Niles Jackson
THE HONORABLE
NILES JACKSON
JUDGE OF THE
DISTRICT COURT

I, TOM PETUSKEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla. this 18 day of Jan, 1996

TOM PETUSKEY, Court Clerk
By /s/ Misstzy Broching Deputy

Approved for entry:

/s/ Bradley D. Brickell
Bradley D. Brickell, OBA #1117
Mahaffey & Gore, P.C.
Two Leadership Sq., Suite 1100
211 North Robinson
Oklahoma City, OK 73102-7101
(405) 236-0478

ATTORNEYS FOR DEFENDANTS THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, OKLAHOMA STEEL & WIRE, INC., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, JOHN VANCE MOTORS AND TROY WESNIDGE

David B. Dykeman, OBA #11819
Derryberry, Quigley, Parrish,
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(405) 528-6569

ATTORNEYS FOR PLAINTIFF

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff,	)	Case No.
vs.	)	CJ-96-5268-65
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	(Filed Jan. 24, 1997)
Defendant and Third Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

JUDGMENT

On January 16, 1997 this action comes before the Court on the Motion For Summary Judgment of Plaintiff, Oklahoma Employers Safety Group, S.I.A. ("OESG"), appearing by counsel of record Mark Pordos and Kent Nicholson, and the Motion For Summary Judgment of the Defendant Colbert Nursing Home, Inc. ("Colbert"), appearing by counsel of record Clifford A. Wright.

The Court, having considered the arguments and reviewed the Briefs in the case and being fully advised, finds that the OESG's Motion For Summary Judgment should be denied, and Colbert's Motion For Summary Judgment should be granted.

The Court further finds that although there is a Third Party Defendant, David Dank, named herein, he was not a party to the two Motions described herein and the Motions before the Court determine all claims between OESG and Colbert exclusive of attorneys fees and costs, and the Court directs the preparation and filing of this Judgment disposing of all the claims between OESG and Colbert, exclusive of attorneys fees and costs, and finds that there is no just reason for delay in the filing of this Judgment, and directs the immediate filing of this Judgment, pursuant to 12 O.S. §994(A).

IT IS THEREFORE ORDERED that Plaintiff's Motion For Summary Judgment is denied, Defendant's Motion For Summary Judgment is granted, and this Judgment is final pursuant to 12 O.S. §994(A).

Dated this 16th day of January, 1997.

NILES JACKSON
Niles Jackson, District Court Judge

APPROVED AS TO FORM:

/s/ Clifford A. Wright
Clifford A. Wright, OBA #9904
CLIFFORD A. WRIGHT, P.C.
Two Leadership Square
211 North Robinson, Suite 1300
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Attorney for Defendant

/s/ Kent Nicholson
Mark Pordos, OBA # 11476
Kent A. Nicholson, Esq., OBA # 16706
Eagleton & Nicholson, P.C.
201 Robert S. Kerr Avenue, Suite 310
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(405) 236-0550
(405) 236-0560 (Fax)
Attorneys for Plaintiff

I, PATRICIA PRESLEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a True, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerks Office of Oklahoma County, Okla. this 24 day of Jan, 1997

PATRICIA PRESLEY, Court Clerk

By /s/ Illegible Deputy

KAUGER, C.J.
SUMMERS, V.C.J.
HODGES, J.
LAVENDER, J.
SIMMS, J.
HARGRAVE, J.
WILSON, J.
WATT, J.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SELF INSURERS' MANAGEMENT GROUP, Plaintiff/Appellant, v. THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, C & H POWER LINE, CHRIS HUNT WATER HAULING, and JOHN VANCE MOTORS. Defendants/Appellants.	No. 86,718 (companion case with No. 88,818) (Filed Mar. 9, 1998)

ORDER

Petitions for rehearing by defendants-appellees in Cause No. 86,718 and by Colbert Nursing Home, Inc., appellee in Cause No. 88,818 are denied.

Recoverable costs shall be taxed *de cursu* in favor of the appellant in each cause. 12 O.S. 1991 § 978; *Wilson v. Glancy*, 1995 OK 141, 913 P.2d 286, 292. Only cost deposits *paid* and documented transcript expenses may be taxed on appeal. *Sunrizon Homes, Inc. v. American Guar, Inv. Corp.*, 1988 OK 145, 782 P.2d 103.

Should the appellants prevail on remand by recovering a judgment and be allowed a counsel-fee award based on the provisions of Section 5 of the Agreement in contest, they shall then also be entitled to an allowance for the reasonable value of legal services secured in this appeal. *Carpet World, Inc. v. Riddles*, 1987 OK 42, 737 P.2d 939, 942. Appellants may not succeed by invoking the provisions of 12 O.S. 1991 § 936, 71, 71 O.S. 1991 § 408(i), or 15 O.S. 1991 § 276. None of the cited statutes applies to this controversy over unpaid assessments allegedly due from the employers who are group members. Motion to secure from this court an appeal-related counsel-fee award is hence denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE ON THIS 9TH DAY OF MARCH, 1998.

/s/ Yvonne Kauger
CHIEF JUSTICE

Kauger, C.J., Summers, V.C.J., Hodges, Simms, Opala, and Wat, JJ., concur;
Lavender, Hargrave, and Wilson, JJ., dissent.

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

SECURITIES ACT OF 1933 (15 U.S.C. § 77A ET SEQ.)

15 U.S.C. § 77e. Prohibitions relating to interstate commerce and the mails

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 77j of this title

It shall be unlawful for any person, directly or indirectly-

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

15 U.S.C. § 77l.* Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who –

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

*Note: this is the version of the statute now in effect. Although this statute has undergone amendment during the period relevant here, the pertinent language in subsection (a) has remained unchanged.

15 U.S.C. § 77j. Information required in prospectus

(a) Information in registration statement; documents not required

Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e) of this section –

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of schedule A of section 77aa of this title;

(2) a prospectus relating to a security issued by a foreign government or political subdivision thereof shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of schedule B of section 77aa of this title;

(3) notwithstanding the provisions of paragraphs (1) and (2) of this subsection when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense;

(4) there may be omitted from any prospectus any of the information required under this subsection which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

* * *

(c) Additional information required by rules and regulations

Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(d) Classification of prospectuses

In the exercise of its powers under subsections (a), (b), or (c) of this section, the Commission shall have

authority to classify prospectuses according to the nature and circumstances of their use or the nature of the security, issue, issuer, or otherwise, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate and consistent with the public interest and the protection of investors.

(e) Information in conspicuous part of prospectus

The statements or information required to be included in a prospectus by or under authority of subsections (a), (b), (c), or (d) of this section, when written, shall be placed in a conspicuous part of the prospectus and, except as otherwise permitted by rules or regulations, in type as large as that used generally in the body of the prospectus.

MCCARRAN-FERGUSON ACT

15 U.S.C. § 1012 Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State Regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Oklahoma Securities Act

(Oklahoma Statutes, Supplement 1997, Title 71*)

§ 301. Registration Requirement

It is unlawful for any person to offer or sell any security in this state unless:

(1) it is registered under this act or the security or transaction is exempted under Section 401 of this title; or

(2) it is a federal covered security.

*Note: This is the version of the statute now in effect. Although this statute has undergone amendment during the period relevant here to add Subdivision (2), the pertinent language contained in what is now Subdivision (1) has remained unchanged.

Oklahoma Statutes, Supplement 1997, Title 71*

§ 408. Civil liabilities

(a) Any person who:

(1) offers or sells a security in violation of Sections 201(a), 301, or 404(b) of this title, or of any rule or order under Section 402 of this title, or of any condition imposed under Sections 304(d), 305(f), or 305(g) of this title; or

(2) offers or sells or purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the other party not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable:

(A) in the case of an offer or sale of a security, to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at ten percent (10%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender, less the value of the security when the buyer disposed of it, and interest at ten percent (10%) per year from the date of disposition; or

* * *

(i) No person who has made or engaged in the performance of any contract in violation of any provision

of this title or any rule or order promulgated thereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract. Any defendant who prevails in an action brought under paragraph (1) or (2) of subsection (a) or paragraph (1) or (2) of subsection (c) of this section may recover his reasonable attorneys' fees and costs in the action from the plaintiff if the court, in its discretion, determines that the action was without substantial merit. Any plaintiff who prevails in an action brought under paragraph (1) or (2) of subsection (a) or paragraph (1) or (2) of subsection (c) of this section may recover his reasonable attorneys' fees and costs in the action from the defendant.

* * *

*Note: This is the version of the statute now in effect. Although this statute has undergone amendment during the period relevant here, the pertinent language has remained unchanged.

Oklahoma Statutes, Supplement 1996 § 149.1*

§ 149.1. Group self-insurers

A. The Workers' Compensation Court shall adopt rules permitting two or more employers not otherwise subject to the provisions of Section 2b of this title to pool together liabilities under this act for the purpose of qualifying as a group self-insurer and each such employer shall be classified as a self-insurer.

B. The Court shall approve the distribution of an undistributed policyholders' surplus of a Workers' Compensation Self-Insurance Program if the Program complies with the following criteria:

1. Has been in business for at least five (5) years;

2. Has its financial statements audited by a public accounting firm which audits at least one corporate client which has assets in excess of One Billion Dollars ($1,000,000,000.00) and on which the accounting firm has issued an unqualified opinion as to the fair presentation of the financial position of the Program showing adequate solvency and reserves; and

3. Is in compliance with the provisions of this title and all other regulations as required by the Court.

C. A group self-insurer created pursuant to this section either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities Act.

*Note: This is the current version of the statute. Subsection C was added by amendment effective November 1, 1996, *after* (1) the Trial Court Judgment in favor of the YWCA Petitioners, and (2) the filing of Petitioner Colbert's Counterclaim.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

SELF INSURORS MANAGEMENT GROUP,	)	
Plaintiff,	)	Case No.
v.	)	CJ-89-9984
THE YWCA, et al., on behalf of themselves and all similarly situated members/shareholders of Self Insurors Management Group,	)	
Third-Party Plaintiffs,	)	
v.	)	
CHRIS STURM, individually,	)	
Third Party Defendant.	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT – THE "AGREEMENTS" ARE UNREGISTERED SECURITIES AND VOID

COME NOW the undersigned Defendants The YWCA of Oklahoma City, et al. ("Defendants") and hereby move for summary judgment to be rendered in their favor and against Plaintiff Self Insurors Management Group ("Plaintiff"). The undersigned Defendants, members of the Plaintiff organization, were holders of an unregistered security under the laws of the State of Oklahoma and the Federal Securities laws in that the Application for Membership, Indemnity Agreement and Power of Attorney (attached hereto as **Exhibit 1**) clearly constitutes

a security under the law and is undisputed that *it was not registered* as a security by the Plaintiff or any other party.

* * *

UNDISPUTED MATERIAL FACTS:

* * *

3. **NEW EVIDENCE. The Agreements were solicited with an offering circular**, an example of which is attached hereto as **Exhibit 2**, which states "We invite your inquiry today. In today's climate of constantly increasing costs in all phases of business overhead, SIMG offers a real and substantial savings, along with professional claims, servicing to the qualified employer. For additional information, please phone or write: Self Insurors Management Group, P.O. Box 3880.";

4. The offering circular (attached hereto as **Exhibit 2**) promises **$$$$$$ YOUR PREMIUMS PLUS INVESTMENT INCOME RETURNED TO YOU!**;

5. The Agreements (attached hereto as **Exhibit 1**) were never registered as securities with the Oklahoma Securities Commission or the SEC. (See previous admission by the Plaintiff, Page 4 of the Response filed by SIMG on or about December 12, 1990, attached hereto as **Exhibit 3**). Complete financial information as would be required by an offering prospectus was not furnished to prospective members for review prior to signing the membership Agreements. (See Affidavits attached hereto as **Exhibit 4**);

6. The undersigned Defendants, as indicated by the attached Affidavits (**Exhibit 4**), were not informed of the

following at the time of the execution of the membership Agreements, to-wit:

a. Names of other members;

b. Financial solvency of other members;

c. Type of industry or commerce other members were involved in;

d. The amounts of commission paid to insurance agents and the group administrator;

e. Financial status of the association at the time the members executed the agreement; and

f. The reserve practice and policies of the Plaintiff association.

7. The offering circular was used by Mark Insurance Agency and others to solicit "members" for the Plaintiff association. (See **Exhibit 5** attached hereto);

8. The Plaintiff's Amended Petition alleges the Defendants are "indebted" to the Plaintiff for an amount in excess of $2 million. (See Amended Petition filed herein).

ARGUMENTS AND AUTHORITIES

Introduction

This action is now an attempt by the Plaintiff to collect a money judgment in excess of $2 million under its Amended Petition jointly and severally against each of the undersigned Defendants, all of whom are "members" of the Plaintiff association organized pursuant to its Article of Association as a "non-stock" association. The administrator of the Plaintiff organization and "control

person" under definitions of securities laws under federal and state regulation is Chris Sturm.

* * *

PROPOSITION I: THE AGREEMENTS ARE SECURITIES.

By both state and federal government, certain laws have been enacted to protect the general public against certain types of wily planners and schemers who would seek separate unsophisticated or unsuspecting persons from their money and are easy prey for such persons. There is absolutely no question that the Agreements executed between the Plaintiff and the Defendants (**Exhibit 1**) fall within the definition of security pursuant to 71 Okla. State. § 2 (last amended 1992) as follows:

> **(16) investment of money or money's worth including goods furnished and/or services performed in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy decision of the venture; . . .**

* * *

A brief review of the economic arrangements outlined in the offering circular (**Exhibit 2**) and the Agreement (**Exhibit 1**) clearly reveal that the Defendants' premium dollars (risk capital) was *in the direct control of the Administrator, Chris Sturm, and the Board of Supervisors.* After payment, the Defendants lost all control whatsoever over the premium dollars.

In addition, federal definition of the term "security" under the Securities Act of 1933, 15 U.S.C. § 77(b), has been very broadly construed to include **participation in any agreement which creates a common economic enterprise**. *McGill v. American Land & Exploration Company*, 776 F.2d 923 (10th Cir. 1985), states:

> [t]he definition of a security contract is to be established pursuant to **the economic reality of the situation**, not merely what the parties have chosen to call the agreement itself. [Emphasis added]

Also, see *The Securities & Exchange Commission v. American Commodity, Inc.*, 546 F.2d 1361 (10th Cir. 1976), which holds that the agreement in question did subject the party to risk over which he had no control and when the outer structure of the arrangement was pierced, it is clear that *it was indeed a security as the Act defines that term*. Other cases, including *Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd.*, 544 F.2d 1059 (10th Cir. 1976), refer to *SEC v. Howey Co.*, 328 U.S. 293 (1946), which states:

> [t]o determine the existence of a security **the Court should apply a flexible, rather than a static, principal, one capable of adaption to meet the countless invariable schemes devised by those who seek to promote the use of other's money on the promise of holding out of profit**. [Emphasis added]

It is clear from the offering circular (**Exhibit 2**) that the Defendants were led to expect a profit in the enterprise. Even though the Defendants entered into a contract

with the expectation [sic] other benefits (worker's compensation coverage), the existence of another benefit does not remove the sale from the coverage of the Securities Act. See *Lowery v. Ford Hill Investment Co.*, 556 P.2d 1201 (Colo. 1976).

Further, the Agreements clearly meet the test of "**investment contract**" defined under 71 Okla. State. § 2(11). The Oklahoma Court of Criminal Appeals in *Probst v. State*, 807 P.2d 279 at 284 (Okla. Cr. 1991), relied on the case of *Securities and Exchange Commission v. Howey, supra*, as the authority to determine the elements of investment contracts, to-wit: "(1) an investment; (2) in a common enterprise; (3) with the expectation of a profit through the efforts of others." The Court, in *Probst*, further states, at p. 285, "[t]his Court could go on and on as to types of investments but clearly the modern trend in holding an investment to be a security has now to do with the actual management. This Court specifically adopts the 'substantial' or managerial approach rather than the 'solely' approach."

* * *

If the investor does not share in critical management decisions, he is entitled to protection of the Securities Act, to-wit:

> [t]hese Acts were not enacted to regulate all investments, only those investments where the investor remains passive, turning his capital over to another to employ. **In such case, registration provisions are geared to seeing that the investor has sufficient information about the project in which he is asked to invest and about the people to whom he is entrusting his**

> **capital to make an intelligent investment decision**. [Emphasis added] Professor Joseph Long, *State Securities Regulation – An Overview*, 32 Okl.L.Rev. 541, 569-70 (1979).

Therefore, as amply illustrated hereinabove, the Agreements, when accompanying by the offering circular (**Exhibit 2**), clearly constitute securities which were not registered, nor was sufficient information given to the Defendant members within which to make an informed decision.

* * *

PROPOSITION II: IS THE PLAINTIFF EXEMPT FROM SECURITIES REGISTRATION?

Since it is undisputed that the Plaintiff never registered the Agreements with the Oklahoma Securities Commission or the SEC, Plaintiff must now prove that it is exempt from registration. Title 21, § 401(E) states: "[i]n any proceeding pursuant to the provisions of the Oklahoma Securities Act, the burden of proving an exemption or an exception from definition is upon the person claiming it." This again was reiterated by the Oklahoma Court of Appeals in *Howell v. Ballard, supra*, at p. 129: "[e]xemption from registration is an affirmative defense. The burden of proving same is on appellants." The Court further states that all elements of the exemption must be proven. See *Lambrecht v. Bartiett*, 656 P. 2d 269 (Okra. 1982). **Because of a non-charitable purpose, the Plaintiff does not meet any exception or exemption based upon a non-profit definition.** See 15 U.S.C. § 77(C)(4).

* * *

EVEN IF IT WERE EXEMPT, THE PLAINTIFF FAILED TO COMPLY WITH DISCLOSURE REQUIREMENTS.

* * *

Any reasonable person would consider the financial facts never furnished to the members, as shown by the attached Affidavits **(Exhibit 4)**, to be important information for the Defendants to have in order to be half-way informed before executing the Agreements with the Plaintiff. Any information that *could* influence the members' decision constitutes information that should be disclosed to the Defendants. See *SEC v. Switzer*, 590 F.Supp. 756 (D.C. Okla. 1984).

The Plaintiff's Amended Petition in the instant proceeding is an attempt to enforce an indebtedness in excess of $2 million against the Defendants jointly and severally. **It cannot be disputed that financial condition of the Plaintiff and all companies comprising the membership would be absolutely critical information to the Defendants' decision at the time they executed the Membership Application.**

CONCLUSION

* * *

How on earth could the Defendants not be entitled to protection of the securities laws regarding disclosure of financial information if, by signing the Agreements as alleged by the Plaintiff, they could become indebted for more than $2 million? Quite an investment scheme! The

Defendants could pay hundreds of thousands of dollars for worker's compensation insurance and never receive the "investment" money back promised by the offering circular and later become "indebted" to the Plaintiff for $2.5 million, **each**.

The Plaintiff will obviously contend that these Defendants were not entitled to protection of any securities laws, i.e., **they were *not*** entitled to disclosure of any financial information before entering into this investment. This kind of scheme, a trap for the unwary small business owner, must be stopped and *it must be stopped now*.

* * *

WHEREFORE, in consideration of the premises, the undersigned Defendants The YWCA of Oklahoma City, Inc., et al. pray that summary judgment on Plaintiff Self Insurors Management Group's Amended Petition be entered in favor of the undersigned Defendants and against the Plaintiff, that the Applications/Agreements be adjudicated and unregistered securities and, therefore, void, unlawful and not providing legal grounds for the "indebtedness" sought to be collected by the Plaintiff, and for such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

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By: /s/ _____

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff,	)	
vs.	)	Case No.
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	CJ-96-5268-65
Defendant and Third Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

COLBERT NURSING HOME, INC.'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF OESG; AND BRIEF IN SUPPORT

The defendant Colbert Nursing Home, Inc. ("Colbert"), respectfully submits this Brief in Support of its Motion for Summary Judgment and Response in Opposition to the Motion For Summary Judgment of Oklahoma Employers Safety Group, S.I.A. ("OESG"), and in support of such Motion shows the Court as follows:

* * *

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF OESG

PROPOSITION I: The Interests in OESG Are Securities

The sales literature used to sell interests in OESG, consisting of the Application and Contract For Membership and Indemnity Agreement and Power of Attorney attached as Exhibit "A" to OESG's Motion For Summary Judgment, and Exhibit "G", along with Rule 3 of the Rules of the Administrator of the Workers Compensation Court (attached as Exhibit "E") and the Articles of Association (Exhibit "F") make it clear that purchasing an interest in OESG entails payment of funds to OESG not only for insurance coverage, but for administrative fees and other items described therein, as well as an obligation to pay additional amounts based upon a lack of profitability of OESG, and the possibility that if managed properly by management of OESG, the payment of excess monies in the way of dividends. See specifically the Rules of The Administrator of the Workers Compensation Court, Rule 3, Sections 3 (b)(d)(i)(k)(l) and (m), and Section 12 (which provides the rules relating to collection of monies from purchasers of interests, distribution of surplus monies and in the event of a deficit, assessment or other "call" feature wherein additional monies may be required of members in the event the performance of OESG is not adequately covered by previous collections).

Subproposition I.(a): The Interests Are Securities Under The Oklahoma Securities Act

The Oklahoma Securities Act at 71 O.S. § 2(u) states a security means *any*; (2) stock; (7) certificate of interest or participation in any profit-sharing agreement; (11) investment contract; (15) investment of money or money's worth including goods furnished and/or services performed in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy of the venture; (16) in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing; among other definitions in Title 71. The interests purchased in OESG by Colbert are clearly securities under each of these definitions. A copy of Title 71, Section 2 is attached hereto as Exhibit "K".

The above analysis under the Oklahoma Security Act is re-enforced by recent legislation in Oklahoma which purports to remove investments structured as self insurance associations like OESG and others from the reach of the Oklahoma Securities Act. See Oklahoma Session Law service, Volume 6, Chapter 363, Section 12, amending 85 O.S. 1991, § 149.1 at "C" to wit:

> "C. A group self-insurer created pursuant to this section either prior to or after the effective date of this Act shall not be subject to the provisions of the Oklahoma Securities Act."

The effective date of this purported amendment is November 1, 1996. See Section 20. Copies of this purported new legislation are attached at Exhibit "L".

The fact that the Legislature realized these were securities and desired to remove them from the reach of the Securities Laws in and of itself proves the securities status of the interests in OESG. Colbert filed its Counterclaim relating to the securities status of the investments prior to the effective date of the legislation and accordingly may assert the Securities Laws violations as an affirmative defense and a counterclaim. Further, as the Court is aware through its hearing of the case styled *Self-Insurors Managements Group v. 99 A Training Center, Inc. et al.*, Case No. CJ-89-9984 in the District Court in and for Oklahoma County, in which Your Honor determined the securities status of an association formed and operated in identical aspects with OESG, and which is presently on appeal to the Supreme Court in a case styled *Self-Insurers Management Group v. The YWCA of Oklahoma City, et al.*, Case No. 86718 in the Supreme Court of the State of Oklahoma, both the securities status of self-insured associations such as OESG and SIMG, and the effect of the legislation described above are being reviewed by the Oklahoma Supreme Court. Colbert respectfully requests this Court to take judicial notice of the proceedings described herein.

Subproposition I(B): Interests In OESG Are Securities Under the Securities Act of 1933

The Securities Act of 1993 in Section 2 provides that the term "security" means, among other things, any

stock, certificate of interest or participation in any profit-sharing agreement, investment contract, voting-trust certificate, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. 15 U.S.C. § 77b.(1). A copy of that statute is attached hereto as Exhibit "M".

Unlike the purported new legislation referenced above in Subproposition I.A., the Oklahoma Legislature did not choose to attempt to exclude investments in interests such as OESG or SIMG from the purview of the Federal Securities Laws.

PROPOSITION II: The Securities Are Not Registered With The Oklahoma Department of Securities Or The Securities and Exchange Commission

Attached hereto as Exhibit "H" is an affidavit from Kenneth Maillard of the Oklahoma Department of Securities indicating that interests in OESG are not registered as securities with the Oklahoma Department of Securities.

In Colbert's Affirmative Defenses and Counterclaim Colbert seeks to cancel the Application, and Indemnity Agreement and Power of Attorney which it executed pursuant to its purchase of the securities for two reasons, one being that the securities were not registered with the Oklahoma Department of Securities or the Securities and Exchange Commission and as a result, Colbert did not receive the disclosures it would have received had the securities been registered. Attached hereto is Exhibit "N"

is Schedule A to the Securities Act of 1933 which includes some of the information which is required to be furnished to a purchaser of securities when a registration statement has been filed.

Section 301 of the Oklahoma Act provides in part, that it is " . . . unlawful for any person to offer or sell any security in this state unless (1) it is registered under this Act . . . ". Any person who offers or sells a security in violation of Section 301 of the Oklahoma Act is liable to the person buying the security for the consideration paid, together with interest at 10% per year from the date of payment, costs and reasonable attorneys fees. Section 408(a)(1) of the Oklahoma Act. Further, under 71 O.S. § 408(i) provides "No person who has made or engaged in the performance of any contract in violation of any provision of this Title or any rule or order promulgated thereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract. Here, OESG seeks additional funds in excess of those already paid by Colbert under a contract which is clearly in violation of Title 71. The contract cannot be enforced.

Accordingly, OESG may not assert any suits whatsoever under the Exhibit "A" Application and Contract For Membership or Indemnity Agreement and Power of Attorney and Colbert moves the Court for such a judgment.

Since the OESG investments are securities, and were not registered under the Oklahoma Act, Colbert is entitled to cancel the securities purchase and may also, if it

desires, recover the entire investment, plus interest, costs and attorneys fees under Section 408(a)(1) of the Oklahoma Act. Colbert is also entitled to recover such sums from every person who offered or sold the securities, and from every person who directly or indirectly controlled any such person, among others. Sections 408(a)(1) and 408(b) of the Oklahoma Act. This would include, for example, David Dank who unquestionably controlled OESG during the years of investment and operation.

The Securities Act of 1933 has similar remedies under Section 5 (15 U.S.C. § 77(e) and § 12(1) (15 U.S.C. 77l(1)) and Section 11(e) of the 1933 Act (15 U.S.C. § 77k(e)).

* * *

Respectfully submitted,

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff,	)	Case No.
vs.	)	CJ-96-5268-65
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	
Defendant and Third-Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

COLBERT NURSING HOME, INC.'S REPLY TO RESPONSE OF OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.'S RESPONSE TO COLBERT NURSING HOME, INC.'S MOTION FOR SUMMARY JUDGMENT AND REPLY

Colbert Nursing Home, Inc. ("Colbert") replies to Oklahoma Employers Safety Group, S.I.A's ("OESG") Response to Colbert's Motion For Summary Judgment and other matters filed by OESG December 18, 1996.

Colbert incorporates by reference its Motion for Summary Judgment and Response in Opposition to Motion For Summary Judgment of OESG.

* * *

PROPOSITION I: THE INTERESTS IN OESG ARE SECURITIES

In response to this Colbert argument OESG claims that OESG is not subject to the provisions of the Oklahoma Securities Act (page 4 of OESG Response) and that OESG is not subject to the provisions of the Federal Securities (sic.), (page 5 of the OESG Brief). OESG thus does not argue that the interests are not securities, just that they are somehow "exempt".

Colbert has already argued the inapplicability of the new Oklahoma legislation effective November 1 of this year, and will rely on its Brief in chief as to the inapplicability, non-retroactively [sic] of the Statute, its effective date, and that it can not destroy an existing defense in contravention of the Oklahoma Constitution, Article 5, § 54.

OESG's second argument is that this is merely an insurance contract between an insurance company and an insured. However, this is not a contract for insurance only, this is a contract for participation in an insurance company with ownership attributes thereto. For example, when a person purchases health insurance does that person also receive voting rights with respect to the provider of the health insurance? Of course not, and that is one distinction between participating in an insurance company through a membership or ownership position as in OESG, versus a straight insurance contract wherein a specified dollar amount is paid for the insurance coverage.

That of course highlights the next argument and that is, in an insurance policy not subject to the securities laws

a premium is paid and insurance coverage is provided, but that is it. On the other hand, participation in an insurance company such as OESG includes the possibility that in addition to the amounts paid initially as "premiums", the participant can be billed for assessments if the venture is unsuccessful, or may receive dividends if the venture is successfully managed by management. This is not something an insured under a straight insurance contract receives, and it is only straight insurance contracts that are not subject to the securities laws under the "exemptions" argued by OESG.

OESG next argues what the ultimate purpose of the agreement between the parties is, but Colbert certainly asserts that the purpose is clearly to participate in an insurance company that was supposed to be professionally managed. The cite to *Am. Mut. Reinsurance v. Calvert Fire Insurance Co.*, 367 N. E. 2nd 104, 109 (Ill. Po. App. 1977) is not authority (an Illinois Appellant Court decision) and involved litigation between *2 insurance companies* regarding an insurance contract. The instant action involves an insurance company and essentially a shareholder that is not an insurance company, Colbert. The relationship between Colbert and the insurance company it invested in is between member/shareholder and entity. The relationship in the *American Mutual Reinsurance* case is between 2 insurance companies and is therefore factually distinguishable. There is no reinsurance agreement between Colbert and OESG. Unlike the parties in *American Mutual Insurance Company*, both of which were in the insurance business, Colbert clearly is not in the insurance business. See page 108. At page 110 it is important to the Illinois Appellate Court that "Amreco agreed to pay a *set*

premium for obtaining Calvert's commitment. That *premium would not vary in any amount in that, unlike profits derived from an investment, Calvert's income from premiums was fixed by the contract"*. This is exactly the opposite of Colbert's position in its relationship with OESG. It is absolutely clear that the documents allow additional billing for losses sustained in the business and payment of dividends should a profit be derived from the investment. As to Colbert, there is no fixed payment and there is no fixed return. *American Mutual Reinsurance* and its references to the McCarran-Ferguson Act are clearly distinguishable factually.

OESG also cites *F.T.C. v. National Casualty Co.*, 357 U.S. 560, 78 F.Ct. [sic] 1260, (1958) but that adds nothing to OESG's argument and simply reinforces the fact that all of the parties in these cases are insurance companies and of course insurance companies are regulated under insurance laws that are designed to protect them. Conversely, Colbert is not an insurance company and the protections provided by insurance laws are designed to protect insurance companies and injured workers, not investors in the insurance companies and the relationship between an investor and the insurance company in which it invests is regulated under the securities laws, not the insurance laws. This case dealt with advertising practices of insurance companies. OESG has not offered a case where the Supreme Court has withdrawn from the Securities and Exchange Commission its authority to protect an investor in an insurance company and instead relegated that authority to an insurance commissioner somewhere. Accordingly, the rules of Workers Compensation Court referred to in the Brief at page 6 only protect the

injured workers, to make sure that in the event of a deficit, the financial statement of the investors will be strong enough to cover the pooled liability in this case for in excess of 200 investor employers. It is not designed in any fashion to protect the investors.

The arguments referred to above are also applicable to the cite of OESG to 15 U.S.C. 77C(a)(8) because again this is not just an insurance policy issued by a company, it is an investment in the company itself because of the participation in profit and loss which is geared at least in part to third party management, and in this case, Colbert never even had an opportunity to vote on management. OESG's cite to *American Deposit Corp. v. Schacht*, 887 F. Supp. 1066 (N.D. Ill. 1995), a northern district of Illinois District Court case is not persuasive and again is distinguishable because this is not a straight policy of insurance. *American Deposit* is also inapplicable because it deals with the relationship between a national bank and an insurance commissioner, and not an investor in the national bank with respect to his relationship in the national bank.

Actually, *American Deposit* stands for the proposition that a packaged offer, in that case a "retirement CD", was in reality an insurance annuity, and supports Colbert's contention that the investment offered by OESG of insurance and participation in profit and loss of a company with 200 investors packaged together is not just an insurance policy but an investment constituting a security.

Accordingly, as to Colbert's Proposition I, the interests are securities and they are not exempted or otherwise not classified as such by virtue of the arguments set out

in OESG's Response Brief. Accordingly, the interests are securities under both the Oklahoma Securities Act and the Securities Act of 1933.

PROPOSITION II: THE SECURITIES ARE NOT REGISTERED WITH THE OKLAHOMA DEPARTMENT OF SECURITIES OR THE SECURITIES AND EXCHANGE COMMISSION

OESG conceeds this argument by not arguing it and the Affidavits obtained from the Oklahoma Department of Securities and the Securities and Exchange Commission as Exhibits "H" and "H-2" are conclusive. The securities are not and have never been registered.

* * *

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STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff,	)	Case No.
vs.	)	CJ-96-5268-65
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	
Defendant and Third-Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

COLBERT NURSING HOME, INC.'S REPLY TO OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.'S SUPPLEMENTAL RESPONSE FILED JANUARY 7, 1997

Employers Safety Group, S.I.A ("OESG") has filed another Brief (the "January 7, 1997 Brief") relating to the Motions For Summary Judgment of each of the parties. It was the understanding of counsel for Colbert that briefing was completed pursuant to order of the Court, with Colbert's December 20, 1996 Brief, but in any event, Colbert will reply to the January 7, 1997 Brief. Inasmuch as OESG does not respond to most of the arguments and evidence offered by Colbert in its Brief filed December 20, 1996, and only addresses three substantive issues, those are the only issues Colbert will address in this Reply.

With respect to the narrative on David Dank contained in this particular OESG Brief, since it is not supported by admissible evidence it is merely unsubstantiated counsel argument and must be disregarded for Rule 13 purposes.

OESG IS SUBJECT TO THE OKLAHOMA AND FEDERAL SECURITIES LAWS

This issue is addressed in Propositions I and II of Colbert's Briefs. OESG does not add any new argument but basically rehashes its argument that interests in the investment are nothing more than ordinary ("straight") contracts of insurance (and therefore fit in the exemption or exclusion from the securities laws for ordinary ("straight") insurance contracts. Apparently, OESG does not understand the concept, but it is simple. When a "straight" insurance contract is purchased the insured pays a set premium for an agreed upon amount of coverage. In contrast, when was the last time an insurance policy gave the holder (a) the right to vote on management of the insurance company and (b) dividends if the company operated at a profit or (c) an assessment (payment of undetermined additional amounts) if the company operated at a loss? That is the difference between a "straight" insurance contract, and the investment in the case at bar. As demonstrated in Colbert's Brief, and as anyone who has ever purchased an insurance policy is clearly aware, these interests in OESG are not simply insurance by the payment of a premium, but are participation in an insurance company on an open ended basis. As pointed out in Colbert's Brief the consideration paid by purchasers of interests in OESG consists not only of

amounts computed on the basis of the insurance coverage, but also the promise to pay for any shortfalls in operation of the Association, or to receive dividends back based on profitable performance of the investment. When a person purchases "straight" insurance through the state insurance fund, they do not sign up for these additional risks (and costs) or potential benefits and (and rewards), and they do not have the right to elect the insurance commissioner.

Similarly, when an insurance policy is purchased the holder of the insurance policy does not have the right to *vote* on management of the issuing company because it is not a shareholder in that company. Here, voting rights clearly indicate securities status because the purpose of the voting rights is to give the individuals that invest, but that must rely on management to make a profit so that they will not sustain additional loss in the way of assessments, the right to select that management based on performance of management. Of course, annual elections did not happen, (OESG has failed to respond to Colbert's evidence and arguments relating to failure to have elections), and nothing further is necessary in this Brief with respect to that issue.

OESG attempts to boot strap applicability of 85 O.S. §149.1 as described in the earlier Briefs of the parties by stating that since Colbert never had a defense because OESG sold only a "straight" insurance contract, no defense has been destroyed. This simplified argument to wire around the Constitution of the State of Oklahoma does not merit any further arguments except to say that clearly the Legislature felt these interests were securities

and attempted to exclude them from the Oklahoma Securities Act. That attempt fails for the reasons stated in Colbert's earlier Briefs including the Oklahoma constitutional argument, and of course is not binding with respect to the Federal Securities Laws.

* * *

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IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,	)	
Plaintiff/Appellant,	)	No. 88,818
vs.	)	(Companion
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,	)	With No. 86,718)
Defendant/Appellee, and Third-Party Plaintiff,	)	
vs.	)	
DAVID DANK,	)	
Third Party Defendant.	)	

PETITION FOR REHEARING AND BRIEF IN SUPPORT

The Defendant/Appellee Colbert Nursing Home, Inc., d/b/a Southern Pointe Living Center, an Oklahoma corporation ("Colbert") petitions the Court for rehearing relating to the Opinion filed in this Appeal July 8, 1997. Colbert respectfully requests that the July 8 opinion be reviewed to correct errors made in the Opinion as noted below.

Colbert's claims included state securities laws violations, federal securities laws violations, and Oklahoma Employers Safety Group's failure to comply with Workers Compensation Court Rules *and its own Amended Constitution and By-laws* (see document number 6 in the Record on Accelerated Appeal ("ROA") and in particular page 3 paragraph 11 regarding failure to provide notice with

respect to elections of directors or to conduct such elections, page 5 under the side caption "OESG Fact Number 3", page 13, first and second full paragraphs, and page 14 Proposition IV; and Exhibit "F", p. 1-2.) The synopsis of the Opinion and the Opinion at p. 3, 4, 6 and 7 seem to indicate that the gist of OESG's argument was that because there were no elections *prior* to OESG's investment that constituted a material breach of the agreement. While that is partially correct, OESG's argument at the trial court level was there were *never any elections both before and during Colbert's participation in OESG*. Colbert also pointed out that during that time there were undisclosed deficits (both before and after Colbert's investment), which adversely reflect on management of the offering and directly impact on its investment. Elections of directors are the only way Colbert had to correct mismanagement of the investment. Second, even if one assumed that there were elections after Colbert became a member, OESG was still saddled with the deficits of prior years. Accordingly, the failure to disclose deficit status at the time of investment, along with the failure to conduct elections both before and during membership are material. Stated another way, why would the Workers Compensation Court Rules and OESG's Constitution and Bylaws (after amendment) require elections, if elections were not material? Also, purchasers of pure insurance do not receive the right to elect directors of the insurance company with which they purchase insurance.

There is no fact issue with respect to the fact that there has *never* been an election in OESG either before Colbert participated or during its participation. OESG has produced an in house generated document not signed or

verified by any person that purports to list some members from whom OESG obtained a proxy. See ROA Document 7, Exhibits G and H. *A proxy is not an election.* These documents do not even indicate whether there were enough proxies received to obtain the vote for any *proposed slate of directors.* No evidence is offered by OESG in the ROA that any *election* ever took place. On the other hand the Affidavit of Kelly Mitchell clearly indicates Colbert was never provided with notice of any such election. At the very least this is also a fact issue for remand to the trial court. Elections are important for several reasons including but not limited to the fact that deficits continued to accrue and exist in OESG and that deficits have accrued during the entire course of David Dank's administration. Deficits must be made up through increased premiums, which is what occurred when OESG assessed an additional "premium" that was approximately the same amount, again, as the OESG's original "premium" charged (original "premium" $76,006; additional "premium" $72,469, at See ROA Document No. 6, Exhibit "D".

Accordingly, OESG not only failed to comply with Workers Compensation Court Rules prior to November 10, 1993, but then did not follow its own Constitution and By-law amendment. This is supported by admissible evidence in the way of the Kelly Mitchell Affidavit attached to document 6 in the ROA as Exhibit "A", paragraph 5. The Court in the July 8 Opinion makes no finding regarding failure to conduct elections after Colbert's participation. At the very least the Court should remand this issue for trial. Recasting the second issue on page 4 of the July 8 Opinion in a manner limiting the election argument to

pre-participation by Colbert is erroneous because it limits Colbert's argument in a manner not consistent with the actual substance of Colbert's trial court argument.

Concerning the July 8 Opinion and its finding that the Oklahoma Securities Act is not available to Colbert as a defense in OESG's action, Colbert respectfully submits that because its participation in OESG was from August 25, 1994 to April 1, 1995 and from April 1, 1995 to March 1, 1996 and that the effective date of the Amendment to §149.1.C. of Title 85 was not effective until November 1, 1996, this ruling is an impermissible destruction of a defense that existed in favor of Colbert and is not permissible under the Constitution of the State of the [sic] Oklahoma or the United States Constitution. See ROA Document No. 8, p. 2, and Oklahoma Constitution Article 5, §54.

On page 5 of the Opinion under the side caption "Federal Securities Laws Do Not Apply To The Facts Of This Appeal" the opinion recites "Without citation of authority Colbert contends the Oklahoma Employers Safety Group violated Federal Securities Laws. We disagree." The citations to the Federal Securities Laws contained in Colbert's Trial Court Brief are found in Document 6 of the Record on Appeal at the following pages: page 9, first complete paragraph (cite to 15 U.S.C. §77b.(1). A copy of that Statute is attached as Exhibit "M" to that Brief; page 11, third complete paragraph (the Securities Act of 1933 has similar remedies under §5 (15 U.S.C. §77(e) and §12(1) (15 U.S.C. 77l(1)) and §11(e) of the 1933 Act (15 U.S.C. §77k(e)); page 12 at the bottom of the first complete paragraph (The Securities Act of 1933

provides for similar disclosure requirements in connection with the offer and sale of securities at §10 and §12(a)(2) (15 U.S.C. §77j and 77l(2)). As with the Oklahoma Act, controlling persons are also liable for the remedies provided. Section 15 (15 U.S.C. §770)). Furthermore, Schedule A of the Securities Act of 1933 (addressing disclosure requirements) is also cited on page 13 on the last line. Schedule A is also attached as an Exhibit to that Brief at Exhibit "N". Accordingly, Colbert did provide citations to authority with respect to its Federal Securities Act claims. Substantively, the claims are basically the same as to the State Securities Act, (failure to register the securities and material omissions and failures to disclose with respect to the sale of the Securities). The remedies are also basically the same, they are just found in The United States Code as opposed to Title 71 of the Oklahoma Statutes.

Colbert also respectfully believes this Court has also misconstrued the application of the McCarran-Ferguson Act with respect to regulation of insurance where the insurance is straight or "pure" insurance, versus an investment in an insurance company. *Federal Trade Commission v. National Casualty Co.*, 357 U.S. 560, 78 Supreme Court 1260, 2 L.Ed. 2d 1540 (1958) did not involve the relationship between a shareholder or other investor and the insurance company where the shareholder made an investment in that insurance company. Accordingly, it is factually distinguishable from the instant appeal.

The Court commented on page 6 of the July 8, 1997 Opinion that Colbert is not primarily an investor, and based on that made a determination that its status as an investor must be secondary to its responsibility as an

employer. The Court also applied the 1996 Amendment in §149.1.C, retroactively to Colbert's participation two years before the effective date to destroy the defense of the Oklahoma Securities Act. Colbert respectfully disagrees with these determinations by the Court and requests rehearing on that issue. While Colbert may be viewed to an extent as an employer regarding its own employees, it is *not* an employer as to the other 200 plus "members' of OESG (as to those members Colbert is extending its credit and financing the investment). When viewed in that perspective, Colbert is an investor relying on management to (1) professionally manage the investment, (2) accurately report the results of the investment, including its deficit status, and (3) conduct elections as required by law and the parties contract. At the time of investment in 1994 all parties had an established, legal procedure relating to their rights. OESG prepared an investment document which was required to be reviewed by the Workers Compensation Court to protect workers, and the Oklahoma Department of Securities and the Securities and Exchange Commission to protect investors. OESG failed to submit the proposal to the proper securities agencies. Under the rules of those securities agencies the deficits and election procedures should have been disclosed. Further, OESG failed to comply with the parties agreement regarding elections. OESG now seeks to double its premium.

Colbert respectfully requests that the Court review its July 8, 1997 Opinion and the arguments and authorities set out in Colbert's Briefs at the trial court level (and used in the accelerated Appeal), which are incorporated

herein by reference. The Trial Court's ruling should be upheld.

RESPECTFULLY SUBMITTED,

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SELF INSURORS MANAGEMENT GROUP,	)	
Plaintiff/Appellant,	)	Case No.
v.	)	86,718
THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, C & H POWER LINE, CHRIS HUNT WATER HAULING, and JOHN VANCE MOTORS,	)	
Defendants/Appellees.	)	

PETITION FOR REHEARING AND BRIEF IN SUPPORT

By *Opinion* filed July 8, 1997, this Court reversed the trial court's decision granting the Appellees summary judgment on grounds that:

1. The agreements between the parties hereto were unregistered securities, and could not therefore be enforced, and

2. The agreement was materially breached by the Appellant, who was seeking enforcement thereof, i.e. the

Appellant had failed to follow material provisions of the agreement requiring that the Rules of the Workers' Compensation Court be complied with, including a rule stating that there must be a "recognizable common purpose" between the members of any group forming an "association" for purposes of group "self-insurance" under 85 O.S. § 149.1.

The Appellees herein below illustrate that the record in the District Court supports this petition, i.e. that this Court's July 8, 1997 *Opinion* be withdrawn and that the District Court ruling, be affirmed, to wit::

1. This Court's July 8, 1997 Opinion improperly applies a substantive law in *"ex post facto"* manner which law was passed by the Oklahoma legislature *after* the subject District Court ruling, in violation of principles of due process and equal protection of the United States Constitution and Amendments thereto, as well as the Constitution of the State of Oklahoma and Amendments thereto.

2. This Court allows the laws of the State of Oklahoma (the enacted *"ex post facto"* law) to improperly preempt or "trump" Federal Securities law in an area which is specifically addressed by Federal Laws, i.e. the definition of security, rules and regulations governing the registration and issuance of securities, as well as laws governing procedure prohibiting the sale and distribution of unregistered securities within these United States.

PROPOSITION I

NO BILL OF ATTAINER OR EX POST FACTO LAW SHALL BE PASSED.[1]

This Court's July 8, 1997 *Opinion*, on page 5, clearly recognizes and relies upon 85 O.S. § 149.1(c), amended, 1996, subsequent to the ruling of the District Court, as follows:

> "A group self-insurer created pursuant to this section either prior to or after the effective date of this act shall not be subject to the provisions of the Oklahoma Securities Act."

This Court further, on pages 6 and 7 of the subject *Opinion*, erroneously characterizes this "subsequent" legislation as mere clarification, and in partial support, cites 85 O.S. § 61(b), amended in 1993, noting that an "employer . . . accepts joint and several liability. Such notice shall be submitted to the Workers' Compensation Court with application for membership." The Court fails to recognize that the subject agreements herein were entered into long before the referenced amendment to 85 O.S. § 61. Further, the *Opinion*, page 8, indicates that the amendment to 85 O.S. § 149.1 was not a clarification, but a matter of "establishing" policy.

The application of the *ex post facto* clause contained in both the Constitution of the United States, and our own Oklahoma Constitution[2] is based fundamentals [sic] to

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[1] See Constitution of the United States, Section 9, Clause 3.

[2] Article 5, Section 52, " . . . After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit."

the concept of constitutional liberty, and therefore protected by the due process clause of the fifth and fourteenth amendments. (See *McDonald v. Champion*, 962 F.2d 1455 (10th Cir. 1992) [Okl.], cert. denied 113 S.Ct. 256.

Additionally, the citizens of Oklahoma are further guaranteed that, "No person shall be deprived of life, liberty or property, without due process of law." See Article 2, Section 7 – Constitution of the State of Oklahoma). This Honorable Court held, in 1985, that the validity of a judgment in the District Court is governed by the law "in force when the judgment is entered". See *Timmons v. Royal Globe Ins. Co.*, 713 P.2d 589 at 594 (Okl. 1985). This rationale also applies to legislative criminal sentencing guidelines, which cannot be made "retroactive" to the disadvantage of a criminal defendant. See *U.S. v. Gerber*, 24 F.3d 93 at 96 (10th Cir. 1994) [Okl.]; *U.S. v. Tisdale*, 7 F.3d 957 at 965 (10th Cir. 1993) [Okl.].

Further, [after enacted] federal legislation is subject to the same test, as addressed by *Lennox v. Evans*, 87 F.3d 431 at 432 (10th Cir. 1996) [Okl.], citing to the United States Supreme Court, to wit:

> "As specified by the Supreme Court, a statute has 'retroactive effect' when applied to a case filed prior to passage of the new legislation if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' " See *Landgraf v. U.S.I. Film Prods.*, 114 S.Ct. 1483 at 1505 (1994).

It would be difficult to logically argue that the Appellees herein were not adversely affected by the 1996 amendment to 85 O.S. § 149.1, as a "retroactive effect" under the *Landgraf* rationale. For the reasons, this Court should affirm the District Court's judgment herein.

PROPOSITION II

THIS COURT ERRONEOUSLY RELIED UPON ACTS OF THE OKLAHOMA LEGISLATURE TO "PREEMPT" FEDERAL SECURITIES LAW.

As argued in the trial court below (Record Item 5, page 1, Indexed to the District Court Record – *Defendant's Motion For Summary Judgment* – Filed July 31, 1995, *"The agreements are unregistered securities and void"*) the Appellees have stated that an agreement entitled "application for membership, indemnity agreement and power of attorney" was an unregistered security, not only under the laws of the State of Oklahoma, but Federal Securities laws as well.

In the same document, page 2 at Record Item 5, it was *undisputed* that the agreements were never registered as securities, either with the Oklahoma Securities Commission, or the Securities and Exchange Commission ("SEC"). Continuing on page 4 of this same Record Item 5, the Appellees argued, "The agreements themselves (Exhibit 1) are violative of the securities regulations laws of both the state and federal governments and, therefore, unlawful." The appellees thereafter proposed, on page 7 of Record Item 5, as follows:

> "In addition, federal definition of the term 'security' under the Securities Act of 1933, 15

U.S.C. § 77(b), has been very broadly construed to include participation in any agreement which creates a common economic enterprise. *McGill v. American Land & Exploration Company*, 776 F.2d 923 (10th Cir. 1985), states:

> [t]he definition of a security contract is to be established pursuant to the **economic reality of the situation,** not merely what the parties have chosen to call the agreement itself. [Emphasis added]

Also, see *The Securities & Exchange Commission v. American Commodity, Inc.*, 546 F.2d 1361 (10th Cir. 1976), which holds the agreement in question did subject the party to risk over which he had no control and when the outer structure of the arrangement was pierced, it is clear that *it was indeed a security as the Act defines that term.* Other cases, including *Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd.*, 544 F.2d 1059 (10th Cir. 1976), refer to *SEC v. Howey Co.*, 328 U.S. 293 (1946), which states:

> [t]o determine the existence of a security the Court should apply a flexible, rather than a static, principal, one capable of adaption to meet the countless invariable schemes devised by those who seek to promote the use of the other's money on the promise of holding out of profit.

It is clear from the offering circular (Exhibit 2) that the Defendants were led to expect a profit in the enterprise. Even though the Defendants entered into a contract with the expectation of other benefit (worker's compensation coverage), the existence of another benefit does not remove the sale from the coverage of the Securities Act. See *Lowery v. Ford Hill Investment Co.*, 556 P.2d 1201 (Colo.

1976)." Further, the Agreements clearly meet the test of an "investment contract" defined under 71 Okl. Stat. § 2(11). The Oklahoma Court of Criminal Appeals in *Probst v. State*, 807 P.2d 279 at 284 (Okla. Cr. 1991), relied on the case of *Securities and Exchange Commission v. Howey*, supra, as the authority to determine the elements of investment contracts, to-wit: '(1) an investment; (2) in a common enterprise; (3) with the expectation of a profit through the efforts of others.' The Court, in *Probst*, further states, at p. 285, '[t]his Court could go on and on as to types of investments but clearly the modern trend in holding an investment to be a security has now to do with the actual management. This Court specifically adopts the 'substantial' or managerial approach rather than the 'solely' approach.' "

Clearly, as shown above, the State of Oklahoma has relied upon Federal laws defining securities in prior cases. See also *SEC v. Switzer*, 590 F.Supp. 756 (W.D. Okl. 1984). As argued in the District Court (page 10 of Record Item 5), the Appellees clearly had shown that the agreements in questions were not entitled to a "non-profit" exception or exemption under federal law, referring to 15 U.S.C. § 77(c)(4).

Despite the District Court's finding that the subject agreements were securities, and despite the record showing these "agreements" to be [unregistered] securities under both State and Federal Securities laws, this Court's *Opinion* of July 8, 1997, makes no mention of how the "after enacted" amendment to Title 85 § 149.1 somehow "trumps" Federal Securities laws, as well as those of the State of Oklahoma. It is possible that this Court inadvertently failed to analyze the entire basis for the District

Court's *Opinion*, including state *and* Federal Securities laws.

Under 15 U.S.C. § 3901, *et seq.* Congress specifically addressed the status of membership in "reciprōcal insuror organizations" similar to the Appellant herein, and provided the [sic] that the ownership interest of members *would* be considered securities under § 77(q) of the Securities Act of 1933, and § 78(j) of the Securities Exchange Act of 1934.

State laws are *not* controlling in construing what is a "security" under 15 U.S.C. § 77(b), *et seq.*, which determination is clearly governed by federal law (in the event of a conflict). See *Farrell v. U.S.*, 321 F.2d 409 (9th Cir. 1963), cert. denied 84 S.Ct. 631. See also *Securities Exchange Commission v. Los Angeles Trust Deed and Mort. Exchange*, 186 F.Supp. 830 (S.D. Cal. 1960), modified on other grounds, 285 F.2d 162, cert. denied 81 S.Ct. 1095. In an appeal from Oklahoma District Court to the Tenth Circuit, it was held that despite protection under federal ERISA law, employees were *not* barred from invoking the Federal Securities Act to protect their interests in certain benefit plans. (*Uselton v. Commercial Loveless Motor Freight, Inc.*, 940 F.2d 564 (10th Cir. 1991) [Okl.], cert. denied 112 S.Ct. 598. This Court's *Opinion* deprives the Appellees the shelter of federal laws which were specifically designed to protect them.

The United States Supreme Court in *Howlett By and Through Howlett v. Rose*, 110 S.Ct. 2430, (1990), on remand 571 So.2d 29 has held " . . . supremacy clause forbids state courts to disassociate themselves from federal law

because of disagreement with its contents or refusal to recognize superior authority of its source."

Holloway v. Peat, Marwick, Mitchell & Co., 879 F.2d 772 at 785 (10th Cir. 1989) [Okl.], cert. granted and vacated *Peter Marwick Main & Co. v. Holloway*, 110 S.Ct. 1314 on remand 900 F.2d 1485 (10th Cir. 1990), cert. denied *KPMG Peat Marwick v. Holloway*, 111 S.Ct. 386, held that the State of Oklahoma could *not* displace the applicability of Federal Securities laws to issuers of passbook savings certificates, and " . . . **We find nothing in federal securities acts to indicate that Congress intended the states to displace the protections of Federal Securities laws . . .**" This Court's July 8, 1997 *Opinion* fails to support this principle.

The "agreements" stand as securities under pre-existing Oklahoma law. The *Opinion* fails to show how 85 O.S. § 149.1 somehow preempts or supersedes the Oklahoma statutory definition of security under 71 O.S. § 2, merely because it is later in time. The undisputed facts in showing the District Court clearly show the subject agreements fall within the definition of securities under the laws of the State of Oklahoma. The *Opinion* fails to address the [apparent] conflict between Oklahoma Securities laws and the new amendment to 85 O.S. § 149.1, other than by failing to mention the former.

PROPOSITION III

APPELLANTS MAY NOT ENFORCE AN AGREEMENT IT MATERIALLY BREACHED.

As shown on page 2 of Record Item 6 (undisputed facts No.s 3 through 5) [of the District Court record],

Section 3(b) of the Rules of the Workers' Compensation Court, was addressed. It was undisputed that the Appellees and other "members" of the Appellant organization were not engaged in the same or similar types of business and had no recognizable common purpose for associating. Further, pages 2 and 3 of Record Item 6, undisputed facts No. 6, clearly show that the Appellant pledged to abide by the above Rule(s) of the Workers' Compensation Court. This Court's *Opinion*, page 9, makes a finding that the above-noted "recognizable common purpose" includes those persons willing to take the risk of being self-insured in return for paying less for group self-insurance. If this construction is proper, what would be the purpose of Rule 3, Section 3(b)? Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137 at 174 (1803) held:

> "It cannot be presumed that any clause in the Constitution is intended to be without effect . . . "

It appears that this Court has construed Section 3(d) to the point to which it is "without effect".

Further, it was clearly shown in the undisputed facts that the Appellant pledged in the subject "agreement" to faithfully follow the by-laws of the organization requiring elections of a board of supervisors, and it did not. This issue was not before this Court at the time the July 8, 1997 *Opinion* was issued. Although raised by the Appellees below, this was not addressed in the decision and Journal Entry of the District Court being appealed herein.

The subject *Opinion* finding, as "a matter of law", that completely dissimilar businesses can be associated for purposes of group self-insurance, appears to usurp the

clear, expressed intent of the Oklahoma legislature. The power to express such an intent was assigned to the legislature in the Constitution of the State of Oklahoma, Article 5, Section 1, et seq.

CONCLUSION

For the reasons propounded above, Appellees below request this Honorable Court to grant this Petition For Rehearing, to withdraw the July 8, 1997 Opinion and affirm the decision of the District Court, and for such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

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